(28,578)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 623.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

CITY OF OAKLAND; PERRY F. BROWN, AS SUPERINTENDENT OF STREETS; F. A. COOLEY, AS TREASURER, &c., ET AL.

IN ERROR TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1922.

1 In the Supreme Court of the State of California.

S. F., No. —.

CHARLES BUTTERS et al., Plaintiffs and Appellants,

vs.

CITY OF OAKLAND et al., Defendants and Respondents.

Transcript on Appeal From the Judgment of the Superior Court of the State of California in and for the County of Alameda.

Honorable Frec V. Wood, Judge.

2 In the Superior Court of the State of California in and for the County of Alameda, Dept. No. 1.

No. 47887.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY (a Corporation), Berkeley Rock Company (a Corporation), Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Plaintiffs,

vs.

CITY OF OAKLAND (a Municipal Corporation), PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc. (a Corporation), Defendants.

Amended Complaint.

Plaintiffs above named complain of defendants above named by their amended complaint, pursuant to leave of court, and for cause of action allege:

First. That at all the times herein mentioned plaintiff Rockridge Place Company was and now is a corporation organized and doing business under the laws of the State of California.

3 That at all the times herein mentioned plaintiff Berkeley Rock Company was and now is a corporation organized and doing business under the laws of the State of California.

Second. That at all the times herein mentioned defendant Marsh Bros. and Gardenier, Inc. was and now is a corporation organized and doing business under the laws of the State of California.

Third. That at all the times herein mentioned defendant, City of Oakland was and now is a municipal corporation organized and existing under and by virtue of the constitution and laws of the State

of California, governed by a charter adopted at an election held in said City of Oakland, and approved by the legislature of said state.

That by the provisions of said charter, the governing power of said City of Oakland at all the times herein mentioned was and now is vested in a council.

That by the provisions of said charter, among the chief officials of said city were at all times herein mentioned and now are a superintendent of streets, and also a treasurer.

Fourth. That at all the times herein mentioned defendant Perry F. Brown was and now is the duly appointed, qualified and
4 acting superintendent of streets of said City of Oakland, and that at all the times herein mentioned F. A. Cooley was and now is the duly appointed, qualified and acting treasurer of said City of Oakland.

Fifth. That on December 14, 1914, said council of said City of Oakland passed and adopted a resolution, No. 9397 N. S., in the words and figures as follows:

Oakland City Council.

Resolution of Intention No. 9397, N. S.

Introduced by Commissioner Baccus.

Resolution of intention to improve Broadway between Patton street and Ocean View Drive, Patton street between Fifty-ninth street and Broadway, and a portion of a right of way granted by H. S. Patton to the City of Oakland.

Whereas, the public interest and convenience require that the work and improvement hereinafter described should be done, and

Whereas, in the opinion of this council said work and improvement is, and is hereby declared to be, of more than local or ordinary public benefit, now

Therefore, the city council of the City of Oakland does hereby resolve and declare that it is the intention of said council to order the following work and improvement to be done in said city, to wit:

5 That Broadway from the production of the northeastern line of Patton street to a straight line drawn at right angles to the eastern line of Broadway at its intersection with the northern line of Ocean View Drive, and Patton street from a line drawn parallel to and distant ten (10) feet southeasterly from the southeastern line of Fifty-ninth street to the western line of Broadway, each, be graded; also

That a concrete culvert, having a length of one hundred forty-two (142) feet (measured along its center line) and maximum internal dimensions of seven and one-half (7½) feet in height, by eight (8) feet in width, be constructed so that the center line, bearing north thirty-seven degrees thirty minutes east (N. 37° 30′ E.) of said culvert passes through a point on the southwestern line, produced, of

Patton street, distant thereon four hundred thirty-five (435) feet southeasterly from the southeastern line of Fifty-ninth street, and the northeastern and southwestern ends of said culvert are distant, respectively (measured along the center line of said culvert), eighty (80) feet northeasterly, and sixty-two (62) feet southwesterly from said point on the southwestern line, produced, of Patton street; also

That a concrete curtain wall be constructed at each end and
6 a concrete wing wall be constructed at the northeastern end of the aforedescribed concrete culvert; also

That two (2) brick manholes with cast iron tops be constructed as follows: one on the center line of the aforesaid culvert at a point distant thereon, thirty-three (33) feet southwesterly from the northeastern end thereof; and one on the northeastern curb line of Patton street distant three hundred fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

That a brick storm water inlet with cast iron top be constructed on the southwestern curb line of Patton street distant three hundred fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

That a pipe conduit, having an internal diameter of fourteen (14) inches, be constructed from the first above named manhole to the second above named manhole; and a pipe conduit, having an internal diameter of ten (10) inches, be constructed from the second above named manhole to the aforesaid inlet;

Excepting, however, from the aforesaid work the grading of that portion of Broadway bounded as follows: on the northeast by the production of the southwestern line of Patton street; on the southeast by a straight line drawn from a point on the production of the southwestern line of Patton street distant, thereon, one hun-
7 dred (100) feet southeasterly from the western line of Broadway distant, thereon, three hundred twenty (320) feet southerly from the southwestern line of Patton street; and on the west by the western line of Broadway; also

Excepting such portions as are required by law to be kept in order or repair by any person or company having railroad tracks thereon.

All portions of the aforesaid culvert lying outside of Patton street and Broadway are within the right of way granted by H. S. Patton to the City of Oakland by that certain indenture recorded December 2, 1914, in volume 2284 of deeds, page 445, Alameda County records.

And said council does hereby determine and declare that the aforesaid work and improvement is of more than local or ordinary public benefit and will effect and benefit the district hereinafter described, which said district is hereby declared to be the district benefited by said work and improvement and that therefore the entire cost and expense of said work and improvement shall be and are hereby made chargeable against and shall be assessed upon said district, which district is within the City of Oakland, County of Alameda, State of California, and is particularly bounded and described as fol-
8 lows, to wit:

Beginning at the intersection of the center line of Ocean View Drive with the production of the western line of lot 18 of Hillside Terrace, as said lot is shown on the map of "A redivision of Hillside Terrace," filed June 28, 1909, in book 24 of maps, page 80, Alameda County records; thence along the center line of Ocean View Drive to the center line of Acacia avenue; thence along the center line of Acacia avenue to the center line of Brookside avenue; thence northwesterly along the center line of Brookside avenue to the center line of Chabot Road, as said road is shown on the map of the "Resubdivision of blocks 9, 10, 11, 12, 13, 14, and a portion of block 16 Rock Ridge Terrace," filed March 16, 1911, in book 26 of maps, page 15, Alameda County records; thence along said center line of Chabot Road to the center line of Buena Vista avenue; thence along said center line of Buena Vista avenue to the production of the northeastern line of lot 16, block 6, aforesaid resubdivision of blocks in Rock Ridge Terrace; thence along said production of and along said northeastern line of lot 16 to the northeastern boundary line of the aforesaid resubdivision of blocks in Rock Ridge Terrace; thence southeasterly along said last named boundary line to the angle
9 point thereon at the northeastern line of said Chabot Road; thence continuing southeasterly along said last named boundary line a distance of six hundred (600) feet; thence in a direct line to the most southern corner of lot 3, block H of the "Claremont Chabot Tract," as shown on a map thereof, filed June 23, 1913, in book 28 of maps, page 28, Alameda County records; thence along the eastern boundary line of said Claremont Chabot Tract to the southwestern line of the Tunnel Road; thence along said southwestern line of the Tunnel Road to the eastern boundary line of the City of Berkeley; thence southerly along said eastern boundary line to the southern boundary line of said City of Berkeley; thence westerly along said southern boundary line of the City of Berkeley to the center line of Eucalyptus Road; thence along said center line of Eucalyptus Road to the production of the eastern line of lot S of the "Eucalyptus Hill Claremont" tract, as said lot is shown on a map thereof, filed March 16, 1907, in book 22 of maps, page 51, Alameda County records; thence along said eastern line of lot S, and its productions, to the center line of Harwood avenue; thence along the center line of Harwood avenue to the production of the eastern line of "Vernon Park," as said park is shown on a map thereof, recorded November 12, 1868, book 34 of deeds, page 640, Alameda
10 County records; thence along the production of and along said eastern line of "Vernon Park" to a point distant one hundred (100) feet northwesterly from the northwestern line of Shafter avenue; thence southwesterly parallel to the northwestern line of Shafter avenue to the production of the western line of the aforesaid lot 18 of Hillside Terrace; thence in a direct line to the point of beginning. Saving, excepting and excluding from the aforesaid district all public streets included and contained therein.

In this resolution whenever a distance from a line is given the distance measured at right angles to such line is meant unless otherwise stated.

This city council hereby determines that serial bonds shall be issued to represent assessments of twenty-five dollars or over for the cost of said work and improvement; said serial bonds shall extend over a period ending five years from the second day of January next succeeding the date of said bonds, and an even annual proportion of the principal sum thereof shall be payable, by coupon, on the second day of January, every year after their date, until the whole is paid, and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year at a rate of seven per cent pen annum on all sums unpaid, until the
11 whole of said principal and interest are paid. Said bonds shall be issued in accordance with the provisions of an act of the legislature of the State of California, designated and referred to as the "Improvement act of 1911," and all acts amendatory thereof or supplementary thereto.

All of the aforesaid work and improvement shall be done in accordance with the provisions of the above named "Improvement act of 1911," and all acts amendatory thereof or supplementary thereto; also in accordance with the plans and specifications made therefor by Perry F. Brown, superintendent of streets and ex-officio city engineer of said City of Oakland, and adopted by resolution No. 9396 N. S. of this council.

The Oakland Enquirer is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper.

Sixth. That by the records, entries and documents on file in the office of the clerk of the council of said city, and in the office of the superintendent of streets of said city, the following proceedings appear to have been had under and following said resolution of intention No. 9397 N. S. to wit:

12 (*a*) That on December 17, 1914, there was filed in the office of said clerk an affidavit of publication in regular form, stating that said resolution of intention No. 9397 was published and printed on the 15th and 16th days of December, 1914, in said Oakland Enquirer, a newspaper published and circulated daily in said city.

(*b*) That on December 22, 1914, there was filed in the office of the clerk of said city the affidavit of B. J. Nolan, which by its terms stated that affiant was instructed by the superintendent of streets of said city to post notices of the passage of said resolution of intention No. 9397 N. S. of the council of the City of Oakland, adopted December 14, 1914, that he posted conspicuously along the line of said contemplated work or improvement at not more than three hundred feet in distance apart, and not less than three in all, and when the work to be done was only upon an entire crossing or any part thereof in front of each quarter block liable to be assessed, notices of the passage of said resolution of intention, each of which notices was

headed: "Notice of improvement," in letters of not less than one inch in length, and in legible characters stated the fact of the passage of the resolution of intention, its date, and attached to said notice was a printed copy of said resolution of intention and referred to the resolution of intention for further particulars. Said
13 affidavit further stated that the said posting of said notices was begun on December 21st, 1915, and was completed on December 22, 1915. That said affidavit did not state that said notices were posted along the line of the whole of the work described in said resolution No. 9397 N. S. nor did it state the point of commencement of said posting, nor the point of completion of said posting, and it did not state that more than three notices were posted. That said affidavit did not state why said notice was not posted immediately after the passage thereof.

That said affidavit did not state or designate any street or streets, nor the position nor location upon the ground of any part or line of any street within the district of land described in said resolution No. 9397 N. S. along which any notice of passage of said resolution of intention No. 9397 N. S. had been posted, nor the point of commencement nor of completion of the posting on any street. That no other affidavit or proof of any kind was ever filed or entered of record in said proceedings showing the point of commencement or of completion or the number of notices posted along the line of said contemplated work nor showing cause for not immediately posting said notices, nor stating the names or parts of streets within
14 said district of land, nor the location upon the ground of any such street, upon which said notices were posted. nor the point of commencement nor the point of completion of such posting, nor the number of notices posted on any street in said district of land.

(*c*) That on December 14, 1914, said city council by its resolution No. 9396 N. S. adopted the plans and specifications filed by the city engineer in the office of the clerk of said council on December 14, 1914, as the plans and specifications for doing the proposed work described in resolution No. 9397 N. S. above set forth.

(*d*) That on the 11th day of January, 1915, the said city council passed and adopted a resolution, number 9561 N. S. declaring by its terms that the council deemed the work to be required by the public interest and convenience, and ordering and providing for said work and improvement to be done, and by directing its clerk so to do, caused notice thereof with specifications to be posted and kept posted conspicuously for five days near the chamber door of said city council, inviting sealed proposals or bids for doing the work ordered, and also in like manner caused notice of said work inviting such proposals and referring to the specifications posted or on file describing the work so ordered to be done, to be published twice, and that the said proceedings were so posted and published as fol-
15 lows, that is to say, that the posting of said notice of the work with specifications commenced on the 12th day of January, 1915, and continued for five days thereafter and the publication of the notice inviting sealed proposals was made on the 12th and 13th

days of January, 1915, in the Oakland Enquirer, a daily newspaper published and circulated in said city, and designated by said city council therefor.

That in and by said last resolution said city council resolved and declared that all proposals or bids for doing said work would be received on the 28th day of January, 1915, between the hours of 11 o'clock A. M. and 12 o'clock noon of said day, and that at the expiration of said time said city council would open, examine and publicly declare all said proposals or bids.

(e) That on the 28th day of January, 1915, between the hours of 11 o'clock A. M. and 12 o'clock noon, various sealed proposals or bids to do said work and improvement were offered to the clerk of said city council and that the defendant Marsh Bros. and Gardenier, Inc., delivered to said clerk one of the said sealed proposals or bids.

That a resolution was passed and adopted on February 1, 1915, by said council of the City of Oakland entitled, "Resolution
16 awarding contract for the improvement of Broadway between Patton street and Ocean View Drive, Patton street between Fifty-ninth street and Broadway and a portion of the right of way granted by H. S. Patton to the City of Oakland to Marsh Bros. and Gardenier, Inc., No. 9718 N. S." by the terms of which resolution the work and improvement described in the above mentioned resolution of intention was awarded to the defendant Marsh Bros. and Gardenier, Inc.

(f) That on or about February 1, 1915, pursuant to said resolution No. 9718 N. S. defendant Perry F. Brown, as superintendent of streets of the City of Oakland did execute a contract with defendant Marsh Bros. and Gardenier, Inc. by the terms of which contract defendant Marsh Bros. and Gardenier, Inc. did agree to perform the work and improvement described in the resolution of intention above set forth.

That the resolution last aforesaid directed the clerk to post and publish notice of said award of contract in the manner next hereinafter described, and thereby caused notice of the said award of contract in the manner next hereinafter described, and thereby caused notice of the said award to plaintiffs to be and said notice was posted and kept conspicuously posted for five days near the chamber door of said city council, to-wit: from the 2nd day of February, 1915,
17 to the 7th day of February, 1915, both days included, and to be published twice, to-wit: on the 2nd and 3rd days of February, 1915, in said Oakland Enquirer, the newspaper designated by said city council for that purpose.

(g) That no owner nor persons interested in the land in said district filed with the said council a notice of protest or objection in writing any time after the passage of said resolution of intention No. 9397 N. S. and no owner at any time filed with said council any notice of protest, or objection in writing after the passage of said resolution No. 9561 N. S. directing the work to be done, and no owner at any time filed with said council any notice of protest or objection in

writing after the passage of resolution No. 9718 N. S. awarding said work to defendant Marsh Bros. and Gardenier, Inc., above mentioned.

Eighth. (*a*) That on the 6th day of June, 1915, the city engineer of said City of Oakland made a diagram of the property affected by the proposed work as described in the aforesaid resolution of intention, and to be assessed to pay the expenses thereof, and which diagram showed each separate parcel of land, the area in square feet of each of such parcels of land and the relative location of the same to the work proposed to be done, all within the limits of said
18 assessment district.

That said diagram was so made and was delivered to the city council, and said city council approved the same by its resolution No. 11025 N. S. passed and adopted on the 6th day of July, 1915; and thereupon said clerk of said city council certified thereon the fact and date of said approval and immediately thereafter delivered the same to the superintendent of streets of said city.

(*b*) That on or about September 8, 1915, said superintendent of streets did issue to said defendant Marsh Bros. and Gardenier Inc., a certificate of completion of the work mentioned in said contract, and that said work was accepted by said superintendent of streets.

(*c*) That on or about September 8, 1915, the said street superintendent made an assessment of the amount to be paid by the owners of the several pieces of land designated on said diagram, and said assessment briefly referred to the contract, the work contracted for and stated to have been performed, and showed the amount to be paid therefor, together with any incidental expenses, the amount of each assessment, the word "unknown" was written opposite the number of each lot and the amount assessed thereon, and none of the names of the owners of any lots was given in said assess-
19 ment, which said assessment was signed by said street superintendent and had attached thereto the diagram above mentioned showing the relative location in such district of each lot or portion of lot to the work done, and numbered in red ink to correspond with the red ink numbers in the assessment, and showing the numbers of the lots assessed for said work, and that said diagram was signed by said street superintendent; and that to said assessment was also attached a warrant, which was signed by the superintendent of streets, and countersigned by the mayor of said city; that said warrant contained a notice that serial bonds bearing interest at the rate of seven per cent per annum and extending over a period ending nine years from and after the 2nd day of January next succeeding the date of said bond, would be issued to represent the cost and expenses of the work described in the assessment, and further contained notice that a bond in such series would issue to represent assessments of $25.00 or more remaining unpaid for 30 days after the date of said warrant or 5 days after the decision of the city council of said City of Oakland upon an appeal;

(*d*) That said warrant, assessment and diagram, together with the certificate of the city engineer of the quantity and char-
20 acter of the work done were on September 8, 1915, recorded in the office of said Superintendent of streets in book 13 of street assessments, page 1 and following, and the record thereof was signed by said street superintendent in his official capacity, and said diagram was on said date filed in the office of the superintendent of streets of said city.

(*e*) That on the 8th day of September, 1915, the said street superintendent issued and delivered said assessment, certificate and diagram attached, and certified on each as recorded by said street superintendent, to the said defendant Marsh Bros. and Gardenier, Inc.

(*f*) That defendant Marsh Bros. and Gardenier, Inc., returned said warrant within 30 days after its date with a verified return attached thereto stating that said contractor had made demand within thirty days after September 8, 1915, upon the several owners of land in said district for the amount of the assessment set forth in such assessment against each parcel of land, and further stating that none of the assessments had been paid by any of the plaintiffs named herein. That said return was recorded by said street superintendent in the margin of the record of the warrant and assessment and that said superintendent signed the same. That
21 none of the plaintiffs herein has paid any such assessment nor any part thereof.

(*g*) That various owners of land in said district appealed within 30 days after September 8, 1915, in writing filed with the clerk thereof, to the council of said City of Oakland from said assessment, upon the ground that assessment was incorrect and unjust.

Ninth. Such appeal coming on regularly for hearing before such council, said council of said City of Oakland, by its resolution No. 11903 N. S. passed and adopted on December 28, 1915, set aside the assessment and warrant above mentioned and said resolution No. 11903 N. S. by its terms found and determined the total cost and expense of said work to be the sum of $27,978.68, and directed said superintendent of streets to make and issue to Marsh Bros. and Gardenier, Inc., the contractors, a new warrant and assessment and diagram and to assess the sum of $27,978.68 upon the subdivisions of land designated upon said diagram of said assessment district approved by resolution No. 11025 N. S. That said resolution No. 11903 N. S. by its terms provided that in the table of assessments therein set forth, the figures under the heading "Number of lot on diagram" in each case was used to describe a particular lot of land in said assessment district as said lot of land was corre-
22 spondingly numbered upon the diagram approved by said city council on July 6, 1915, by resolution No. 11025 N. S. and filed on September 8, 1915, in the office of the superintendent of streets, and recorded in said office with said first therein mentioned warrant and assessment in volume 13 of street assessments

of said city at page 1 thereof and following, as aforesaid, and that the amount which should be assessed upon and against each lot of land by said superintendent of streets in making said new assessment was set opposite the number of said lot and under the heading "Amount of assessment;" that upon said diagram the number of each of said lots of land was denoted by a figure or figures enclosed by a circle.

That in the table of assessments set forth in said resolution No. 11903 N. S. as aforesaid, were the number of lots and the corresponding assessments affecting the land of plaintiffs as hereinafter mentioned:

Tenth. (*a*) That defendant Perry F. Brown as superintendent of streets in said City of Oakland has threatened and now threatens to make and issue a new warrant and assessment and diagram as directed by said resolution No. 11903 N. S. and record the same in the office of the superintendent of streets in the book of street assessments and deliver said warrant, assessment and diagram
23 to defendants, Marsh Bros. and Gardenier, Inc.

That said warrant, assessment and diagram will constitute a cloud on the title to the land of plaintiffs hereinafter mentioned, if so made and recorded as threatened by said defendants.

(*b*) That defendant Perry F. Brown as superintendent of streets of said City of Oakland threatened and now threatens to issue a certificate to the treasurer of said City of Oakland of the said assessments unpaid. That defendant Marsh Bros. and Gardenier, Inc., has threatened and now threatens to apply to defendant F. A. Cooley as treasurer of the City of Oakland for the issuance of bonds upon the lands of these plaintiffs and that defendant F. A. Cooley as treasurer of the City of Oakland has threatened and still threatens to issue said bonds. That said bonds, and each of them, will constitute a cloud upon the title of the lands of these plaintiffs if so made and issued as threatened by said defendants.

Eleventh. That plaintiffs above named at all the times herein mentioned were and now are the owners, and each of them is, respectively, the owner of lots and parcels of land situate and being within the district described in the resolution of intention
24 above set forth as being assessable for such work, and that said land of plaintiffs, and of each of them has been directed to be assessed as aforesaid, and said superintendent of streets threatens to assess the same and each parcel thereof; that said land has been delineated upon and designated by a descriptive assessment number enclosed by a circle on the diagram filed and recorded in the office of the said superintendent of streets in volume 13 of street assessments, page 1, as aforesaid.

That the following is a particular designation of the land of the several plaintiffs, to-wit:

1. That plaintiff Charles Butters at all the times herein mentioned was and now is the owner of all those lots designated on said diagram by the assessment numbers 46, 47, 48, 337, 338½, 339 and

389, which numbers are hereby referred to as designating the land of said plaintiff.

2. That plaintiff Edith F. Wright at all the times mentioned herein was and now is the owner of all those lots designated on said diagram by the assessment numbers 1, 2, 3, 50, 76 to 89, both inclusive, 91 and 92, which numbers are hereby referred to as designating the land of said plaintiff.

3. That plaintiff Rockridge Place Company at all the times herein mentioned was and now is the owner of all that lot designated on said diagram by the assessment number 49, which number is hereby referred to as designating the land of said plaintiff.

4. That plaintiff Berkeley Rock Company at all the times herein mentioned was and now is the owner of all those lots designated on said diagram by the assessment numbers 52, 53 and 55, which numbers are hereby referred to as designating the land of said plaintiff.

5. That plaintiff Amelia J. Brocklehurst at all the times mentioned herein was and now is the owner of all those lots designated on said diagram by the assessment numbers 271, 272, 273 and 274, which numbers are hereby referred to as designating the land of said plaintiff.

6. That plaintiff Gus Brause at all the times herein mentioned was and now is the owner of all those lots designated on said diagram by the assessment numbers 250, 254 and 255, which numbers are hereby referred to as designating the land of said plaintiff.

7. That plaintiff Mary A. MacDonald at all the times herein mentioned was and now is the owner of all that lot designated on said diagram by the assessment number 319, which number is hereby referred to, designating the land of said plaintiff.

Twelfth. That no notice by posting was given after the adoption of said resolution, as required by sec. 55 of the improvement act of 1911 referred to in said resolution, and in particular as follows:

1. That said street superintendent did not, nor did any other person immediately or within a reasonable time after the adoption of said resolution of intention as aforesaid, post or cause to be posted along the line of said proposed work or along any street or streets in the proposed district chargeable with said work, any notice or notices of said resolution of intention.

2. That said street superintendent did not, nor did any other person at any time after the adoption of said resolution of intention as aforesaid or at any other time, post or cause to be posted along the line of said proposed work on any street or streets, or on any street or streets in the proposed district chargeable with said work, any notice or notices stating briefly the work or improvement proposed by said resolution of intention.

3. That said street superintendent did not, nor did any other person at any time, conspicuously or otherwise, post or cause to be posted any such notice or notices along all the streets within such district at not more than three hundred feet in distance apart
27 and did not post such notices, not less than three in all, on each street in said district.

Thirteenth. That neither said resolution of intention nor said resolution ordering and directing the work nor did any notice of said resolutions or of either of them sufficiently or at all describe the work or improvement therein mentioned; and that no jurisdiction was acquired by said counsel to award any contract for said work or improvement.

Fourteenth. That article XIX, section 126 of the charter of said City of Oakland, did at all times herein mentioned contain and now contains the following provision:

"Each bid shall have thereon the affidavit of the bidder that such bid is genuine and not sham or collusive or made in the interest or in behalf of any person not therein named and that the bidder has not directly or indirectly induced or solicited any other bidder to put in a sham bid, or any other person, firm or corporation to refrain from bidding. and that the bidder has not in any manner sought by collusion to secure to himself an advantage over any other bidder. Any bid made without such affidavit or in violation thereof, and also any contract let thereunder, shall be absolutely void."

That the contract above mentioned as being entered into
28 by defendant Perry F. Brown, as superintendent of streets of said City of Oakland, with defendant Marsh Bros. and Gardenier, Inc. was pursuant to and was let upon the bid in writing of defendant Marsh Bros. and Gardenier, Inc. submitted by said defendant to the council of the City of Oakland and filed in the office of the city clerk of said City of Oakland, but said bid did not have any affidavit thereon or therewith as required by the above mentioned provision of the charter of the City of Oakland, or at all, and said bid and said contract let thereunder and all proceedings subsequent thereto was and were absolutely void.

Sixteenth. That in making the expense of said work or improvement chargeable upon the district described in said resolution of intention and in making and delineating said district, said city council did not take into consideration the lands to be benefited by said work or improvement, but on the contrary arbitrarily and wilfully excluded from said district lots, parcels, and pieces of land equally to be benefited by said proposed work or improvement and said counsel arbirtrarily and wilfully discriminated against the owners of the lots, pieces and parcels of land included within the district described in said resolution of intention and denied to the owners of said lots, pieces and parcels of land in said district the
29 equal protection of the laws, with the result and effect to deprive said owners of lots, pieces and parcels of land in said

district, of their property without due process of law, all in violation of the fourteenth amendment to the constitution of the United States.

Seventeenth. That defendants, if they shall, as they threaten to do, issue and record said warrant, diagram and assessment or shall issue such bonds mentioned in said resolution of intention against the land of these plaintiffs, will cause plaintiffs great annoyance and irreparable injury in clouding the title to the land of plaintiffs and cause a multiplicity of actions, for all of which no plain, speedy or adequate remedy is afforded to plaintiffs by the ordinary rules of common law.

Eighteenth. That this action is commenced and maintained on behalf of any and all owners of, or persons interested in, the lands in the district described in said resolution of intention, who may at any time desire to join herein.

Wherefore, plaintiffs pray

Firstly, That this court make an order requiring the said defendants to show cause at a time and place to be specified therein therein why an injunction should not be granted restraining defendant Perry F. Brown, as superintendent of streets of the
30 City of Oakland, and all persons acting under his authority, from making or recording said assessment or delivering the same to defendant Marsh Bros. and Gardenier, Inc. and restraining said F. A. Cooley as treasurer of said City of Oakland from issuing such bonds mentioned in the resolution of intention No. 9397 N. S. above set forth pending the determination of this action, and in the meantime restraining and enjoining said defendants in the manner aforesaid until the return of said order to show cause.

Secondly, That this court adjudge and determine that the resolution of intention of the council of the City of Oakland to do the work did not sufficiently describe the work or any part thereof, and that notices of such improvement were not posted along the line of the work to be done, and along all the streets within the district described in said resolution of intention, and that said city council acted arbitrarily and unfairly in making said district.

Thirdly, That this court issue a writ of injunction enjoining and restraining said defendants from committing any of the acts or from carrying into execution any of their threats hereinbefore mentioned, and that this court make and enter a final decree perpetually enjoining and restraining the defendant Perry F.
31 Brown, as superintendent of streets of the City of Oakland, from making, issuing or recording said warrant, assessment or diagram and from proceeding further therein and restraining said F. A. Cooley as treasurer of said City of Oakland, from issuing such bonds, and for such other and further relief as may be meet

and in accordance with the rules of equity and for costs of this action.

C. IRVING WRIGHT AND
L. D. MANNING,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA,
County of Alameda, ss:

Edith F. Wright, being duly sworn says: That she is one of the plaintiffs in the above entitled action and has read the foregoing amended complaint and knows the contents thereof and that the same is true of her own knowledge except as to matters therein stated on information or belief and that as to such matters she believes it to be true.

EDITH F. WRIGHT.

Subscribed and sworn to before me this 20th day of January, 1916.

[SEAL.] L. C. FISH,
Notary Public in and for the County of Alameda, State of California.

32 (Endorsed:) Filed Jan. 21, 1916, Geo. E. Gross, County Clerk, by W. E. Adams, Deputy Clerk.

[Title of Court and Cause.]

Amended Amendment to Amended Complaint.

Plaintiffs above named complaining of defendants above named, by leave of court first had and obtained, file this, their amended amendment to the amended complaint herein, and for cause of action further allege:

That at no time prior to the adoption and passage of said resolution of intention No. 9397 N. S., in said amended complaint set out and referred to, or afterwards or at all, was any grade fixed or established by said city council or the City of Oakland, or by any other public or official body or at all on said Broadway between a point thereon distant northerly 695 feet from the southern line of Keith avenue produced easterly and the center line of Temescal Creek, nor on any part or portion thereof.

That at no time prior to the adoption and passage of said resolution of intention No. 9397 N. S. or afterwards or at all
33 was any grade fixed or established by said city council or the City of Oakland, or by any other public or official body or at all on said Patton street or any part or portion thereof.

That by ordinance No. 749 N. S. entitled:

"An ordinance establishing the name of Patton street to a certain street heretofore accepted by the city council by its resolution No.

8427, N. S.; also establishing official curb grades and positions of curbs on Broadway between Keith avenue and Temescal Creek and on said Patton street between Broadway and Fifty-ninth street."

passed, adopted and approved November 30, 1914, said council of said City of Oakland purported and attempted to fix and establish certain grades on said Broadway and on said Patton street, but said ordinance No. 749 N. S. was and is utterly void and of no effect; that said ordinance No. 749 N. S. contains and embraces more than one subject and is not confined to one subject, and is in violation of subdivision 4 of section 46 of Article VIII and in violation of section 51 of article IX of the charter of said City of Oakland.

That said ordinance No. 749 N. S. further attempted to change a grade theretofore established on said Broadway, between said Keith avenue and a point 695 feet northerly from the north
34 return northwest corner of said Keith avenue and Broadway, by ordinance No. 537 N. S. entitled:

"An ordinance establishing official curb grades and positions of curbs on Broadway from Keith avenue northerly."

passed, adopted and approved by said city council on October 14, 1913.

That said purported and attempted change of grade was not made or attempted to be made in any mode or by any procedure authorized or permitted by any law of the State of California or by the charter of said City of Oakland.

That said purported and attempted change of grade is a subject embraced in said ordinance No. 749 N. S. and is not expressed in the title of said ordinance No. 749 N. S. and is utterly void and of no effect and in violation of subdivision 4 of section 46 of article VIII of said charter of said City of Oakland.

That by an ordinance passed by the said council of the City of Oakland on June 20, 1910, entitled:

"An ordinance establishing official grades and positions of curbs on Broadway from Taft avenue to Keith avenue, on Lawton or Third avenue from McMillan street to Broadway, and on the
35 curved portion of Keith avenue at the easterly end of said Keith avenue."

and approved by the mayor of said city on June 26, 1910, and numbered 3091, the official curb grades on said Broadway from Taft avenue to said Keith avenue and from said Ocean View Drive to said Keith avenue and including a large and substantial portion of said Broadway as referred to in said resolution of intention No. 9397 N. S. as within the intention of said council to improve as in said last mentioned resolution of intention set forth, were fixed and established as shown on that certain map entitled: "Map showing official elevations and positions of curbs on Broadway from Taft avenue to Keith avenue on Lawton or Third avenue from McMillan street to Broadway and on the eastern end of Keith avenue.

Oakland, California, May 16, 1910. F. C. Turner, city engineer," filed in the office of the city clerk and clerk of the Oakland City Council on May 26, 1910.

That thereafter and on November 28, 1913, said city council of said City of Oakland passed, adopted and same was then approved an ordinance No. 573 N. S. entitled:

"An ordinance changing and re-establishing curb grades on Broadway between Ocean View Drive and Keith avenue."

36 wherein and whereby said curb grades on Broadway between said Ocean View Drive and said Keith avenue were attempted to be changed and re-established; that by said last mentioned ordinance serious and substantial changes were attempted to be made in said grades; that said changes of said grades if carried into effect upon the ground would cause serious and grave damage to the property adjoining and abutting on said Broadway where said changes were by said last mentioned ordinance made.

That by said resolution of intention No. 9397 N. S. it was the intention of said city council to order and said resolution and the specifications therein referred to show upon their face said intention of said city council to order the work therein referred to to be done in accordance with and pursuant to said change of grades as set out and referred to and made by said ordinance No. 573 N. S.

That the work contemplated and referred to in and by said resolution of intention No. 9397 N. S. was work constituting and that would constitute a change in the established grades of said Broadway between said Ocean View Drive said Keith avenue and that said work constituting said change of grades; as aforesaid would

37 cause grave and serious damage and the doing of said work did in fact cause substantial, grave and serious damage to the lands adjoining and abutting on said Broadway and along the line of said last mentioned work.

That in and by said resolution of intention No. 9397 N. S. and in any by all proceedings subsequent thereto said council of said City of Oakland pretended and purported to act and be acting under and in pursuance of the act of the legislature entitled, "Improvement act of 1911," and all acts amendatory and supplementary thereto.

That in fact said council of said City of Oakland did not in any of the proceedings herein or in the amended complaint herein referred to proceed under or pursuant to said "Improvement Act of 1911," or under or pursuant to any other law, but plaintiffs herein alleges the fact to be that said city council in all said proceedings attempted and purported to proceed under part one of said "Improvement act of 1911" and did not proceed under part two of said "Improvement act of 1911."

That in none of said proceedings was any provision made or attempted to be made by said city council to compensate

38 owners of lands or any of them abutting or adjoining the line of said change of grades on said Broadway for the damages resulting or that would result from the doing of said

work. That said work did in fact cause and occasion substantial and serious damage to said owners and each of them, and to the lands abutting on and adjoining said work as aforesaid. That by reason thereof all said proceedings under said resolution of intention No. 9397 N. S. and subsequent thereto were and are without authority of law and void and in violation of the fourteenth amendment to the constitution of the United States and deprived plaintiffs and each of them of their property without due process of law, and denied to plaintiffs and each of them the equal protection of the laws and further that said proceedings and each and every of them were and are in violation of the constitution of the State of California.

That according to the estimates as to the cost of said work and improvement of said Broadway and Patton streets, made by the superintendent of streets of said City of Oakland, the cost and expense of said work, and improvement on said Broadway and Patton streets was greatly in excess of one half the assessed value of the lots of land abutting on the line of said work and improvement,
39 for a reasonable distance in depth from said work and improvement, as said value was assessed by said City of Oakland on the assessment rolls thereof for the year next preceding the said resolution of said council ordering said work.

Wherefore plaintiffs pray for judgment as prayed in said amended complaint.

C. I. WRIGHT,
L. D. MANNING,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. Irving Wright being first duly sworn deposes and says:

That he is the attorney for the plaintiffs in the above entitled action; that he has read the foregoing amended amendment to the amended complaint herein and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief and as to those matters that he believes it to be true. That the reason that this verification is made by C. Irving Wright is that the facts alleged in said amended amendment to said amended complaint herein are within the knowledge of said C. Irving Wright.

C. IRVING WRIGHT.

40 Subscribed and sworn to before me this 24th day of June, 1916.

[SEAL.]

JOHN E. MANDERS,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed June 26, 1916, George E. Gross, County Clerk, By W. E. Adams, Deputy Clerk.

[Title of Court and Cause.]

Answer of Marsh Bros. and Gardenier, Inc., to Amended Complaint as Amended.

Marsh Bros. and Gardinier, Inc., a corporation, one of the defendants in the above entitled action, for answer in its own behalf to the complaint of plaintiff as amended by the amendment filed June 26th, 1916, in said action, denies and alleges as follows, to-wit:

Defendant admits that on December 14th the council of the City of Oakland passed and adopted resolution number 9397 N. S., but denies that said resolution was or is in the words and figures set forth in said amended complaint, and in this behalf alleges
41 that on December 14th, 1914, said council of said City of Oakland duly passed and adopted a resolution of intention No. 9397 N. S. in the words and figures following, to wit:

Oakland City Council.

Resolution of Intention No. 9397, N. S.

Introduced by Commissioner Baccus.

Resolution of intention to improve Broadway between Patton street and Ocean View Drive, Patton street between Fifty-ninth street and Broadway, and a portion of a right of way granted by H. S. Patton to the City of Oakland.

Whereas, the public interest and convenience require that the work and improvement hereinafter described should be done, and

Whereas, in the opinion of this council said work and improvement is, and is hereby declared to be, of more than local or ordinary public benefit, now

Therefore the city council of the City of Oakland does hereby resolve and declare that it is the intention of said council to order the following work and improvement to be done in said City, to wit:

That Broadway from the production of the northeastern line of Patton street to a straight line drawn at right angles to the eastern line of Broadway at its intersection with the northern line of Ocean View Drive, and Patton street from a line drawn parallel to
42 and distant ten (10) feet southeasterly from the southeastern line of Fifty-ninth street to the western line of Broadway, each be graded; also

That a concrete culvert, having a length of one hundred forty-two (142) feet (measured along its center line) and maximum internal dimensions of seven and one-half (7½) feet in height by eight (8) feet in width, be constructed so that the center line, bearing north thirty-seven degrees thirty minutes east (N. 37° 30′ E.) of said culvert passes through a point on the southwestern line produced, of Patton street, distant thereon four hundred thirty-five

(435) feet southeasterly from the southeastern line of Fifty-ninth street, and the northeastern and southwestern ends of said culvert are distant respectively (measured along the center line of said culvert), eighty (80) feet northeasterly, and sixty-two (62) feet southwesterly from said point on the southwestern line, produced, of Patton street; also

That a concrete curtain wall be constructed at each end and a concrete wing wall be constructed at the northeastern end of the aforedescribed concrete culvert; also

That two (2) brick manholes with cast iron tops be constructed as follows: one on the center line of the aforesaid culvert at a
43 point distant, thereon, thirty-three (33) feet southwesterly from the northeastern end thereof; and one on the northeastern curb line of Patton street distant three hundred fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

That a brick storm water inlet with cast iron top be constructed on the southwestern curb line of Patton street distant three hundred and fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

That a pipe conduit, having an internal diameter of fourteen (14) inches, be constructed from the first above named manhole to the second above named manhole; and a pipe conduit, having an internal diameter of ten (10) inches, be constructed from the second above named manhole to the aforesaid inlet;

Excepting, however, from the aforesaid work the grading of that portion of Broadway bounded as follows: on the northeast by the production of the southwestern line of Patton street; on the southeast by a straight line drawn from a point on the production of the southwestern line of Patton street distant, thereon, one hundred (100) feet southeasterly from the western line of Broadway to a point on the western line of Broadway, distant, thereon, three hundred twenty (320) feet southerly from the southwestern line
44 of Patton street; and on the west by the western line of Broadway; also

Excepting such portions as are required by law to be kept in order or repair by any person or company having railroad tracks thereon.

All portions of the aforesaid culvert lying outside of Patton street and Broadway are within the right of way granted by H. S. Patton to the City of Oakland by that certain indenture recorded December 2, 1914, in volume 2284 of deeds, at page 445, Alameda County records.

And said council does hereby determine and declare that the aforesaid work and improvement is of more than local or ordinary public benefit and will affect and benefit the district hereinafter described, which said district is hereby declared to be the district benefited by said work and improvement and that therefore the entire cost and expense of said work and improvement shall be and are hereby made chargeable against and shall be assessed upon said district, which district is within the City of Oakland, County of Alameda, State of

California, and is particularly bounded and described as follows, to-wit:

Beginning at the intersection of the center line of Ocean View Drive with the production of the western line of lot 18 of Hill-
45 side Terrace, as said lot is shown on the map of "A redivision of Hillside Terrace," filed June 28, 1909, in book 24 of maps, page 80, Alameda County records; thence along the center line of Ocean View Drive to the center line of Acacia avenue; thence along the center line of Acacia avenue to the center line of Brookside avenue; thence northwesterly along the center line of Brookside avenue to the center line of Chabot road, as said road is shown on the map of the "Resubdivision of blocks 9, 10, 11, 12, 13, 14, and a portion of block 16 Rock Ridge Terrace," filed March 16, 1911, in book 26 of maps, page 15, Alameda County records; thence along said center line of Chabot road to the center line of Buena Vista avenue; thence along said center line of Buena Vista avenue to the production of the northeastern line of lot 16, block 6, aforesaid resubdivision of blocks in Rock Ridge Terrace; thence along said production of and along said northeastern line of lot 16 to the no-theastern boundary line of the aforesaid resubdivision of blocks in Rock Ridge Terrace; thence southeasterly along said last named boundary line to the angle point thereon at the northeastern line of said Chabot road; thence continuing southeasterly along said last named boundary line a distance of six hundred (600) feet; thence in a
46 direct line to the most southern corner of lot 3 block H of the "Claremont Chabot Tract," as shown on map thereof, filed June 23, 1913, in book 28 of maps, page 28, Alameda County record; thence along the eastern boundary line of said Claremont Chabot Tract to the southwestern line of the Tunnel road; thence along said southwestern line of the Tunnel road to the eastern boundary line of the City of Berkeley; thence southerly along said eastern boundary line to the southern boundary line of said City of Berkeley; thence westerly along said southern boundary line of the City of Berkeley to the center line of Eucalyptus road; thence along said center line of Eucalyptus road to the production of the eastern line of lot S of the "Eucalyptus Hill Claremont" Tract, as said lot is shown on a map thereof, filed March 16, 1907, in book 22 of maps, page 51, Alameda County records; thence along said eastern line of lot S, and its productions, to the center line of Harwood avenue; thence along the center line of Harwood avenue to the production of the eastern line of "Vernon Park," as said park is shown on a map thereof, recorded November 12, 1868, in book 34 of deeds, page 640, Alameda County records; thence along the production of and along said eastern line of "Vernon Park" to a point distant one hundred (100) feet northwesterly from the north-western line of Shafter avenue; thence southwesterly parallel
47 to the northwestern line of Shafter avenue to the production of the western line of the aforesaid lot 18 of Hillside Terrace; thence in a direct line to the point of beginning. Saving, excepting and excluding from the aforesaid district all public streets included and contained therein.

In this resolution whenever a distance from a line is given the distance measured at right angles to such line is meant unless otherwise stated.

This city council hereby determines that serial bonds shall be issued to represent assessments of twenty-five dollars or over for the cost of said work and improvement; said serial bonds shall extend over a period ending five years from the second day of January next succeeding the date of said bonds, and an even annual proportion of the principal sum ther-of shall be payable by coupon on the second day of January, every year after their date, until the whole is paid, and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year at a rate of seven per cent per annum on all sums unpaid, until the whole of said principal and interest are paid. Said bonds shall be issued in accordance with the provisions of an act of
the legislature of the State of California, designated and re-
48 ferred to as the "Improvement act of 1911," and all acts amendatory thereof or supplementary thereto.

All the aforesaid work and improvement shall be done in accordance with the provisions of the above named "Improvement act of 1911," and all acts amendatory thereof or supplementary thereto; also in accordance with the plans and specifications made therefor by Perry F. Brown, superintendent of streets and ex-officio city engineer of said City of Oakland, and adopted by resolution No. 9396 N. S. of this council.

The Oakland Enquirer is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper.

Defendant alleges that said resolution was signed and attested by said clerk and the mayor of said city and was published by said clerk in the form and manner as follows, to-wit: said publication was on the 15th and 16th days of December, 1914, in said Oakland Enquirer, which was a newspaper published and circulated daily in said city.

Defendant further alleges that immediately after the adoption of
said resolution of intention, to wit: upon the 22nd day of
49 December, 1914, the street superintendent of said city caused to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, and also along all the streets within the district of lands described in said resolution of intention, at not more than three hundred feet in distance apart, but not less than three in all upon each street, notices of the passage of said resolution of intention, each of which notices was headed "Notice of improvement," in letters of not less than one inch in length, and in legible characters, stated the fact of the passage of said resolution of intention, its date, and briefly the work or improvement proposed, and referred to the resolution of intention for further particulars.

Defendant further alleges that the said posting of said notices of the passage of said resolution of intention was completed on the 22nd day of December, 1914, and upon said completion of said posting of said notices, to-wit: on the 22nd day of December, 1914, the superintendent of streets of said city caused to be filed and there was filed in the office of the city clerk of said city an affidavit stating that the posting of said notices of the passage of said resolution of intention was completed on December 22nd, 1914, and that said affida-
50 vit was made by one B. J. Nolan, and is the same affidavit mentioned in paragraph VI of said complaint.

Defendant denies that said last mentioned affidavit did not state that said notices were posted along the line of the whole of the work described in said resolution No. 9397 N. S., and denies that said affidavit did not state the point of commencement of said posting or the point of completion of said posting and denies that said affidavit did not state that more than three notices were posted.

Defendant denies that said affidavit did not state or designate any streets, or streets, or the position or location upon the ground of any part or line of any street within the district of land described in said resolution No. 9397 N. S., along which any notice of passage of said resolution had been posted, and denies that said affidavit did not state or designate the point of commencement or of completion of the posting on any street.

And in this behalf defendant alleges that said affidavit did state and does state that copies of said notice of improvement were posted along all of the streets within the district of lands described in said resolution of intention, at not more than three hundred
51 feet in distance apart, and that not less than three of said notices were posted along each of said streets.

Defendant alleges that neither any owner or owners of property liable to be assessed for said work nor any owner or owners of property within said assessment district did within fifteen days after the completion of the posting of said notices of improvement, make or file with the clerk of said city council any written or other protest against the proposed work or against the extent of the district to be assessed, or both.

Defendant admits that on the 28th day of January, 1915, between the hours of 11 o'clock A. M. and 12 o'clock noon, it delivered to the clerk of said council, its sealed proposal or bid to do said work; and in this behalf alleges that by said proposal or bid it offered to do said work and improvement fully in all respects as required by the specifications at the following prices, to-wit:

Grading street, including sidewalk, (cutting) 68 cents per cubic yard;

Culvert, concrete, $18.00 per linear foot;

14-inch conduit, $1.00 per linear foot;

10-inch conduit, 90 cents per linear foot;

Manholes, $50.00 each;

Storm water inlets, $45.00 each.

52 Defendant further alleges that its said proposal or bid was accompanied by a check payable to said City of Oakland,

duly certified by a responsible bank, for the sum of twenty-seven hundred ($2,700.00) dollars, which said amount was not less than ten per cent of the aggregate of said proposal or bid.

Defendant further alleges that on the 28th day of January, 1915, the said council of said City of Oakland, in open session publicly opened and examined all said proposals or bids and publicly declared the same, and afterwards, to-wit on the 1st day of February, 1915, rejected all said proposals or bids other than the lowest regular proposal or bid of the responsible bidder next hereinafter mentioned, and by its resolution of award of contract number 9,718 N. S. then and there passed by it, awarded the contract for said work or improvement to the lowest responsible bidder therefor, to-wit: to this defendant, and at the prices named in its proposal or bid on file and hereinbefore specified.

Defendant further alleges that in the resolution last aforesaid, the said council of said city directed its clerk to post and publish notice of said award of contract in the manner next hereinafter described, and thereby caused due notice of the said award to this defendant to be posted and kept posted conspicuously for five full days
53 near the chamber door of said city council, to wit: from the 2nd day of February, 1915, to the 8th day of February, 1915, both days included, and to be published twice, to-wit: on the 2nd and 3rd days of February, 1915, in said Oakland Enquirer, which was a daily newspaper, published and circulated in said city, and designated by said city council for that purpose, and that said notice was so published, kept posted and published.

Defendant denies that on or about February 1st, 1915, or at any time except as hereinafter stated, defendant Perry F. Brown, as superintendent of streets of said city did execute a contract with this defendant by the terms of which contract this defendant agreed to perform said work and improvement, and in his behalf alleges: that on the 17th day of February, 1915, said Perry F. Brown, as superintendent of streets of said city in his official capacity, did then and at his office, and in pursuance of said above mentioned award, enter into a written contract for said work and improvement, with this defendant, who was the original bidder to whom said contract had been awarded, and at the prices aforesaid specified in its bid, and therein fixed the time for beginning said work to be on the 19th day of February, 1915, and the time for completing said
54 work to be within one hundred and twenty days thereafter: and wherein and whereby this defendant agreed that it would do and perform all said work according to the said specifications therein and hereinbefore mentioned, and under the direction and to the satisfaction of said street superintendent, and that the materials used should comply with the specifications and be to the satisfaction of said street superintendent, and said contract also contained express notice that in no case except where it is otherwise provided by law or the charter of said city would the city or any officer thereof be liable for any portion of the expense or for any delinquency of persons or property assessed.

Defendant further alleges that previous to the execution of said

contract this defendant advanced to the superintendent of streets of said city the sum of $1,719.07 for payment by it of the cost of publication of the notices, resolutions, orders, and all incidental expenses and matters required under the proceedings prescribed in said "Improvement act of 1911," and of such other notices as might be deemed requisite by said council, together with all other incidental expenses.

Defendant further alleges that before executing said contract and on the 17th day of February, 1915, this defendant filed with
55 the superintendent of streets of said city a good and sufficient bond, executed and signed by this defendant and a sufficient surety, to wit: United States Fidelity and Guaranty Company, a corporation, in the sum of fourteen thousand ($14,000.00) dollars, (being not less than one-half of the total amount payable by the terms of said contract) and which bond was approved by the mayor of said city. That said bond by its terms was made to inure to the benefits of any and all persons, companies or corporations who should perform labor on or furnish materials to be used in said work and improvement, and provided that if this defendant should fail to pay for any materials so furnished for the said work or improvement, or for any work or labor done thereon of any kind, said surety would pay the same to an amount not to exceed the amount specified in said bond.

Defendant further alleges that at the time of entering into said contract this defendant also executed a good and sufficient bond of even date therewith, conditioned for the faithful performance of said contract, and said bond was to the satisfaction and approval of said street superintendent with a sufficient surety to wit: United States Fidelity and Guaranty Company, a corporation, and payable to said city in the sum of seven thousand ($7,000.00) dollars, (being not less than twenty-five per cent of the amount of said contract);
56 and that said bond was duly received by said superintendent of streets and filed in his office as a record.

Defendant denies that on or about September 8th, 1915, or at any time the said street superintendent made an assessment of the amount to be paid by the owners of the several pieces of land designated on said diagram, or made an assessment of any amount to be paid by the owner or owners of any land or lands designated on said diagram or made any assessment except as hereinafter stated, and denies that to said assessment was attached a warrant containing a notice that serial bonds extending over a period ending nine years from and after the 2nd day of January next succeeding the date of said bond would be issued, or that any warrant was attached to said assessment except as hereinafter set forth.

Defendant further alleges that it commenced said work on the 19th day of February, 1915, and did and caused to be done all the work in said contract and specifications mentioned, and duly performed on its part in every respect the said work according to the specifications and the terms of said contract, and with materials complying with the specifications, all under the direction and to the sat-

isfaction of said superintendent of streets, and that the said
57 work was duly approved and accepted by said superintendent of streets, who thereupon proceeded to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece or subdivision of land and who thereupon proceeded to make his assessment and thereupon assessed upon and against said lands in said assessment district the total amount of all said work proposed, performed and in said contract specified, with the incidental expenses, to wit: the sum of $27,978.68 upon the several pieces, parcels, lots or portions of lots and subdivisions of land in said district benefited thereby, to-wit: upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots or subdivisions of land; and that said assessment briefly referred to the contract, the work contracted for and performed. and showed the amount to be paid therefor, together with any incidental expenses, the amount of each assessment, the name of the owner of each lot or portion of lot assessed, if known to the street superintendent, but when the name was unknown to him, the word "unknown" was written opposite the number of the lot, and the amount assessed thereon, the num-
58 ber of each lot, or portion or portions of lots assessed, which assessment was signed by said street superintendent and had attached thereto a diagram exhibiting each street and street crossing, lane, alley, place or court, on which any work had been done, and showing the relative location of each lot or portion of lot to the work done, and numbered in red ink to correspond with the red ink numbers in the assessment, and showing the number of feet fronting, or number of lots assessed for said work, contracted for and performed, which diagram was also signed by the street superintendent; and that to said assessment was also attached a warrant, which was signed by the superintendent of streets and countersigned by the mayor of said city, which said warrant contained a notice that serial bonds bearing interest at the rate of seven per cent per annum and extending over a period ending five years from and after the second day of January next succeeding the date of said bonds, an even annual proportion of the principal sum thereof, payable by coupon on the second day of January every year after their date, and the interest payable semi-annually by coupon on the second days of January and July respectively of each year, would be issued to represent the cost and expense of the work described in the assessment, and further contained
59 notice that a bond in such series would issue to represent assessments of twenty-five dollars or more remaining unpaid for thirty days after the date of said warrant or five days after the decision of the city council of said City of Oakland upon an appeal; and that all of said assessment roll was duly made in the manner and form prescribed by law.

Defendant denies that the warrant and assessment mentioned in said complaint or any warrant and assessment, except the warrant and assessment hereinabove described, were on September 8th, 1915, or at any time, recorded in the office of said superintendent of streets;

and in this behalf defendant alleges that said warrant, and assessment hereinbefore mentioned and described and the diagram described in said complaint together with the certificate of the city engineer of the quantity and character of the work done were duly made and recorded on the 8th day of September, 1915, in the office of said superintendent of streets in a book kept by him for that purpose, to-wit: Book 13 of street assessments, page 1 and following, and the record thereof was duly signed by said street superintendent in his official capacity and said diagram was filed in the office of said
60 superintendent of streets of said city on said date.

Defendant denies that on the 8th day of September, 1915, or at any time the said superintendent of streets issued or delivered the assessment or diagram mentioned in plaintiff's complaint to this defendant, or any assessment or diagram except as hereinafter set forth.

And in this behalf defendant alleges, that on the 8th day of September, 1915, the said street superintendent issued and delivered said warrant hereinabove mentioned with said assessment, certificate and diagram hereinabove mentioned and described, attached thereto, to the said contractor, to-wit: this defendant, all of which instruments were dated on the day last aforesaid, except said certificate which was dated August 2nd, 1915, and had been recorded and certified on each as recorded by said street superintendent; and by virtue of said warrant this defendant, its agents and assigns were authorized to demand and receive the amount of the several assessments made to cover the sums due for the work specified in said contract and assessment.

Defendant further alleges that within thirty days after the date of said warrant E. L. Marsh, who then and at all times hereinafter mentioned was the duly authorized agent of this defendant, in be-
61 half of this defendant, did publicly demand payment on each of the lots or premises assessed for the exact amount separately assessed against said lot of land.

Defendant denies that it returned the warrant mentioned in plaintiff's complaint within thirty days after its date or within any time or at all or any warrant except the warrant herein described or that a verified or any return was attached to said warrant stating that said contractor had made demand within thirty days after September 8th, 1915, upon the several owners of land in said district for the amount of the assessment set forth in such assessment against each parcel of land or that any return was attached thereto, except as hereinafter set forth.

And in this behalf defendant alleges that on the 8th day of October, 1915, and within thirty days after the date of the warrant hereinbefore mentioned and described the said E. L. Marsh in behalf of this defendant, did return said warrant, assessment, certificate and diagram herein mentioned and described, to the said street superintendent at his office, with a return endorsed upon said warrant, signed by said E. L. Marsh, and verified by his oath, duly administered by a competent person, which return stated the nature

and character of the demand, how and when and upon
62 whom, or by its number upon what lot made, and whether any of the assessments remained unpaid in whole or in part and the amount thereof; and that upon October 8th, 1915, the said street superintendent did record the said return in the margin of the record of the warrant and assessment, and also the original contract referred to therein, all at full length, in the books kept by him for that purpose in his office and thereupon signed the said record.

Defendant admits that various owners of land in said district appealed within thirty days after September 8th, 1915, in writing filed with the clerk thereof, to the council of said City of Oakland from said assessment, and in this behalf specifically alleges, to-wit: That on the 7th day of October, 1915, Oakland, Antioch and Eastern Railway, a corporation, the owner of certain land within said district, appealed to said council of said city from said assessment, by briefly stating its objections in writing and filing the same with the clerk of said council.

That on the 6th day of October, 1915, Charles Butters, the owner of certain lands within said district, appealed to the council of said city from said assessment by briefly stating his objections in writing and filing the same w-th the clerk of said council.

63 That on the 5th day of October, 1915, A. J. Brockelhurst, W. A. Bryal, J. A. C. Macdonald, Catherine Heimbold, Gustav Brause, E. Spiganoviz, Florence D. Markx Greene, Wesley Plunkett, Fay M. Oliphant, Geo. M. Mott, Jr., Guy Hyde Chick, John Reyes, James Kirkland, F. B. Norton, W. W. Norton, Geo. Robinson and Marian L. Stebbins severally the owners of certain lots of land within said district appealed to said council from said assessment, by briefly stating their objections in writing and filing the same with the clerk of said council.

That on October 14th, 1915, the said council of said city by its resolution No. 11520 N. S. duly passed and adopted on said last mentioned day, fixed October 21st, 1915, at the hour of eleven o'clock and twenty-five minutes A. M. of said day as the time, and the council chamber of said council in the City Hall of said City of Oakland as the place of hearing said appeals and directed its clerk to post notice of the time and place of said hearing as so fixed, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, conspicuously, near the chamber door of said council, for five days.

That on said 14th day of October, 1915, and pursuant to
64 said resolution last aforesaid, said clerk of said council conspicuously posted on the bulletin board near the chamber door of said council, notice of the time and place of hearing said appeals as fixed by said council as aforesaid, briefly referring to the work contracted to be done or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, and kept said notice so conspicuously posted for five full days thereafter.

That on said 21st day of October, 1915, at the hour of 11:25 o'clock A. M. of said day, said council of said city duly and regularly continued the hearing of said appeals to the 28th day of December, 1915, and that thereafter on said December, 1915, said city council passed and adopted its resolution No. 11903 N. S. mentioned and described in paragraph ninth of plaintiff's amended complaint.

Defendant denies that said new warrant, assessment and diagram mentioned in said amended complaint will constitute a cloud on the title to the lands of plaintiffs mentioned in said amended complaint, if made and recorded as threatened by defendants, and in this behalf alleges that if said new warrant, assessment and diagram be made, issued and recorded in accordance with said resolution of said council, the same will constitute and create valid liens upon said lands.

65 Defendant denies that defendant Perry F. Brown as superintendent of streets of said City of Oakland, threatened or now threatens to issue a certificate to the treasurer of said City of Oakland of the assessments unpaid, and in this behalf defendant alleges that said superintendent of streets cannot lawfully make or issue said certificate and that he will not make or issue said certificate or threaten to make or issue the same until after the full expiration of thirty days from the date of said new warrant, or if an appeal be taken to the said council within five days after the final decision of said council and after the said street superintendent shall have recorded the return as provided in section 25 of the "Improvement act of 1911."

Defendant denies that it has threatened or now threatens to apply to the treasurer of the City of Oakland for the issuance of bonds upon the lands of plaintiffs, and in this behalf alleges that it will not threaten to apply and will not apply to said Treasurer for the issuance of bonds upon any assessment or assessments mentioned in said new assessment, until after said street superintendent shall make and certify to said city treasurer said list of assessments remaining unpaid.

66 Defendant denies that defendant F. A. Cooley as treasurer of said City of Oakland has threatened or still threatens to issue said bonds, and in this behalf alleges that said defendant F. A. Cooley as treasurer of the City of Oakland will not threaten to issue and will not issue said bonds until after said street superintendent of said city shall have made and certified to him a list of all assessments remaining unpaid.

Defendant denies that said bonds or that each or any of them, if made and issued after the making and certifying of said list of assessments unpaid will constitute a cloud upon the title to the lands of plaintiffs and in this behalf alleges that if said bonds are so made and issued, the same will constitute a valid lien upon the lands of plaintiffs.

Defendant denies that no notice by posting was given after the adoption of said resolution, as required by section 5 of the Improvement act of 1911.

Defendant denies that said street superintendent did not or that

any other person did not immediately or within a reasonable time after the adoption of said resolution of intention as aforesaid, post or cause to be posted along the line of said proposed work, or along any street or streets in the proposed district chargeable with said work, any notice or notices of said resolution of intention.

Defendant denies that said street superintendent did not or that any other person did not at any time after the adoption of
67 said resolution of intention, post or cause to be posted along the line of said proposed work or on any street or streets, or on any street or streets in the proposed district chargeable with said work, any notice or notices stating briefly the work or improvement proposed by said resolution of intention.

Defendant denies that said street superintendent did not or that any other person did not at any time, conspicuously or otherwise, post or cause to be posted any such notice or notices along all the streets within such district at not more than three hundred feet in distance apart, or did not post such notices, not less than three in all, on each street in said district.

Defendant denies that neither said resolution of intention nor said resolution ordering and directing the work nor did any notice of said resolutions or either of them sufficiently or at all describe the work or improvement therein mentioned, and denies that no jurisdiction was required by said council to award any contract for said work or improvement.

Defendant denies that section 126 of article XIX of the charter of said city of Oakland, or any other provisions of said charter at any time required that the bid of this defendant to perform and construct the street work mentioned in plaintiff's amended com-
68 plaint should have thereon or therewith the affidavit mentioned in said section 126 of article XIX of said charter or any affidavit.

In this behalf defendant alleges that at all times mentioned in said amended complaint said charter of said City of Oakland provided that whenever in the judgment of the council, the cost and expense of any street work or improvement should be paid by special assessment on private property, the general laws of the State of California in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity thereto.

That the "Improvement act of 1911" under which said proceedings for said street improvement were had and taken, do not provide or require that any bid or proposal made or filed under the provisions of said act for the construction of any street work or improvement should have thereon or therewith any affidavit whatever.

Defendant denies that said bid of this defendant and said contract let thereunder and all proceedings subsequent thereto, or that said bid of this defendant or said contract let thereunder, or all or any proceeding subsequent thereto, was or were absolutely void or void at all.

69 Defendant denies that the land mentioned and described in said resolution as Broadway was not at any time therein mentioned or is not now a street or highway, or that the same has never

been dedicated to the use of the public or accepted by public authority or that the same has not been in the common or undisputed use by the public for a period of five years next preceding the passage of said resolution of intention, and denies that at all times mentioned in said amended complaint, or at any time, the public had or now has no right or title or interest in or to said land or that said land was or is not subject to any easement, or that said land was or is not a street within the meaning of said act of 1911, and in this behalf alleges that at all times mentioned in said amended complaint said Broadway was, ever since, has been and now is an opened and located public street duly dedicated and accepted for public use as a public street and highway.

Defendant denies that in making the expense of said work or improvement chargeable upon the district described in said resolution of intention, or in making or delineating said district, the said city council did not take into consideration the lands to be benfited by said work or improvement, and denies that said city council arbitrarily or willfully excluded, or excluded at all from said dis-
70 trict, lots or parcels or pieces of land equally to be benefited by said proposed work or improvement or benefited at all, or that said council arbitrarily or wilfully discriminated or discriminated at all against the owners of lots, or pieces or parcels of land included within the district described in said resolution of intention, or discriminated against any owner or against any person at all, or that said city council denied to the owners or any of them of said lots, or pieces or parcels of land in said district or to any person the equal or any protection of the laws.

Defendant denies that the result and effect or the result or effect of any act or proceeding of said city council mentioned in plaintiff's amended complaint, or otherwise or at all, was to deprive said owners or any owners or persons of their property without due process of law, and denies that any act or proceeding of said city council mentioned in said amended complaint was in violation of the fourteenth amendment to the constitution of the United States, or of any provision in or amendment to said constitution.

Defendant denies that if the defendants to this action, or any of them shall issue or record said warrant, diagram or assessment, or shall issue the bonds mentioned in said resolution of inten-
71 tion against the lands of plaintiffs, that the same will cause plaintiffs great or any annoyance or irreparable or any injury, or that the same will cloud the title to the land of plaintiffs, or that the same will cause a multiplicity of actions, or that there is no plan or speedy or adequate remedy afforded to plaintiffs by the ordinary rules of common law.

In this behalf defendant alleges that in case the proper officers of said City of Oakland shall issue and record said new warrant, diagram and assessment and shall issue said bonds mentioned in said resolution of intention against the lands of plaintiffs, the same will constitute and will be valid and subsisting liens upon said lands.

Defendant alleges that it has no information or belief sufficient

to enable it to answer the allegations contained in paragraph eighteenth of said amended complaint, and placing its denials upon that ground, denies, that this action is commenced or maintained on behalf of any or all owners of, or persons interested in the lands in the district described in said resolution of intention, who may at any time desire to join herein, or that said action is commenced or maintained on behalf of any person or persons other than the plaintiffs to this action.

Defendant alleges that it has no information or belief sufficient to enable it to answer the allegations contained in paragraph
72 eleventh of said amended complaint, and placing its denials upon that ground, denies, that plaintiffs, or any of them, at all of the times mentioned in said amended complaint, or at any time or times, were or now are the owners, or that each or any of them is respectively or otherwise the owner of lots or parcels of land, or of any lot or parcel of land, situate or being within the district described in the resolution of intention, or that any land of plaintiffs, or of each or any of them, has been directed to be assessed as described in said complaint or directed to be assessed at all, and denies that said superintendent of streets threatens to assess any lot or parcel of land belonging to plaintiffs, or to either or any of them, and denies that any lands of plaintiffs or of either or any of them, have been delineated upon or designated by a descriptive assessment number enclosed by a circle on the diagram filed and recorded in the office of said superintendent of streets in volume 13 of street assessments at page 1, or that any land of said plaintiffs or of either or any of them, has been delineated upon or designated in any manner on any diagram filed or recorded in the office of said superintendent of streets.

Defendant denies that plaintiff Charles Butters at all or any of the times mentioned in said complaint was or now is the
73 owner of all or of any lots of land designated on said diagram by the assessment numbers 46, or 47, or 48, or 337, or 338½, or 339, or 389, or that said plaintiff at any time was or now is the owner of any lot or lots of land designated on said diagram by any number or numbers or designated at all.

Defendant denies that plaintiff Edith J. Wright at all or any of the times mentioned in said complaint was or now is the owner of all or any of those lots of land designated on said diagram by the numbers 1, or 2, or 3, or 50, or 76 to 89 both inclusive, or 91, or 92, or that said plaintiff at any time was or now is the owner of any lot or lots of land designated on said diagram by any number or numbers or designated at all.

Defendant denies that plaintiff Rock Ridge Place Company at all or any of the times mentioned in said complaint was or now is the owner of that lot of land designated on said diagram by the number 49, or that the said plaintiff at any time was or now is the owner of any lot of land designated on said diagram by any number or designated at all.

Defendant denies that plaintiff Berkeley Rock Company, at all

or any of the times mentioned in said complaint, was, or now
74 is the owner of all or any of those lots of land designated on said diagram by the assessment numbers 52, or 53 or 55, or that said plaintiff at any time was or now is the owner of any lot of land designated on said diagram by any number or designated at all.

Defendant denies that plaintiff Amelia J. Brocklehurst at all or any of the times mentioned in said complaint, was or now is the owner of all or any of those lots designated on said diagram by the assessment numbers 271, or 272, or 273 or 274, or that said plaintiff at any time was or now is the owner of any lot of land designated on said diagram by any number or designated at all.

Defendant denies that plaintiff Gus Brause at all or any of the times mentioned in said complaint was or now is, the owner of all or any of those lots of land designated on said diagram by the assessment numbers 250, or 254 or 255, or that said plaintiff at any time was or now is the owner of any lot of land designated on said diagram by any number, or designated at all.

Defendant denies that plaintiff Mary A. McDonald at all or at any of the times mentioned in said complaint was or now is, the owner of the lot of land designated on said diagram by the assessment number 319, or that said plaintiff at any time was or
75 now is the owner of any lot of land designated on said diagram by any number, or designated at all.

Defendant denies that at no time prior to the adoption and passage of said resolution of intention No. 9397 N. S., or afterwards or at all, was any grade fixed or established by said city council of the City of Oakland, or by any other public or official body or at all, on said Broadway, between a point thereon distant northerly 695 feet from the southern line of Keith avenue produced easterly and the center line of Temescal creek, nor on any part or portion thereof.

Defendant denies that at no time prior to the adoption and passage of said resolution of intention No. 9397 N. S. or afterwards or at all, was any grade fixed or established by said city council or the City of Oakland, or by any other public or official body or at all, on said Patton street, or any part or portion thereof.

Defendant admits that by ordinance 749 N. S. mentioned in plaintiff's complaint said council of said City of Oakland purported and attempted to fix and establish certain grades on said Broadway and on said Patton street, and in this behalf alleges that said council in and by said ordinance did duly and lawfully fix and
76 establish certain grades on said Broadway and on Patton street in said ordinance mentioned.

Defendant denies that said ordinance was or is utterly void or void at all or of no effect, or that said ordinance contains and embraces, or contains or embraces more than one subject or is not confined to one subject, and denies that said ordinance is in violation of subdivision 4 of section 46 of article VIII, or of section 51 of article IX of the charter of said City of Oakland, or of any section or article or subdivision of said charter.

Defendant denies that said ordinance No. 749 N. S. attempted

to change a grade theretofore established on said Broadway between said Keith avenue and a point 695 feet northerly from the north return northwest corner of said Keith avenue and Broadway, or attempted to change any grade of any street or of any portion thereof.

Defendant denies that said ordinance 749 N. S. attempted to change a grade theretofore established on said Broadway by ordinance No. 537 N. S. entitled, "An ordinance establishing official curb grades and positions of curbs from Keith avenue northerly" passed, adopted and approved by said city council on October 14th, 1913, or attempted to change any grade therefore established
77 on Broadway by any ordinance of said city council, or attempted to change any grade at all.

Defendant denies that the purported and attempted change of grade mentioned in said complaint is a subject embraced in said ordinance No. 749 N. S., and in this behalf alleges that said ordinance does not by its terms or otherwise or at all purport to change or attempt to change any grade of any street at all, and that the change of the grade of any street or portion thereof is not mentioned in said ordinance.

Defendant denies that the changes of grade provided in ordinance 573 N. S., if carried into effect upon the ground, would cause serious and grave damage, or serious or grave damage or any damage, to the property adjoining or abutting on said Broadway where said changes were made by said last mentioned ordinance.

Defendant denies that by said resolution of intention No. 9397 N. S., it was the intention of said city council to order, or that said resolution or the specifications therein referred to, show upon their face or show at all, the intention of said city council to order the work therein referred to, to be done in accordance with or pursuant to said change of grade as set out and referred to and made by
78 said ordinance No. 573 N. S., or that by said resolution of intention it was the intention of said city council to order, or that said resolution or the specifications therein referred to show upon their face or show at all, the intention of said city council to order the work therein referred to, to be done in accordance with or pursuant to any particular ordinance or resolution or in any other manner than to the official line and grade.

Defendant denies that the work contemplated or referred to in or by said resolution of intention, was work constituting, or that would constitute a change in the established grades of Broadway between said Ocean View Drive and Keith avenue, or that said work would cause grave or serious or any damage, or that the doing of said work did in fact or otherwise cause substantial or grave, or serious, or any damage to the lands adjoining or abutting on said Broadway or along the line of said work.

Defendant denies that said work did cause or occasion substantial or serious or any damage to the owners of land abutting or adjoining said Broadway, or to the owner or owners of any lands or to any owners at all, or to the lands abutting on or adjoining said work.

Defendant denies that by reason thereof or by reason of any-

thing or at all, all or any of said proceedings under said reso-
79 lution of intention No. 9397 N. S. or subsequent thereto, were or are without authority of law or void, or in violation of the fourteenth amendment to the constitution of the United States, or deprived plaintiffs or each or any of them of their property without due process of law or deprived them of their property at all, or denied to plaintiffs or to each or any of them the equal protection of the laws, or that said proceedings or each or every or any of them were or are in violation of the constitution of the State of California.

Defendant denies that according to the estimates as to the cost of said work and improvement of said Broadway and Patton streets, made by the superintendent of streets, of the said City of Oakland, the cost and expense of said work and improvement on said Broadway and Patton street was greatly or at all in excess of one-half the assessed value of the lots of land abutting on the line of said work and improvement, for a reasonable distance and depth from said work and improvement, as said value was assessed by the City of Oakland on the assessment rolls thereof, for the year next preceding the said resolution of said council ordering the same.

Further answering said complainant defendant alleges
80 that more than ten days have elapsed since the date of the first publication of said notice of award of contract above mentioned, and neither the plaintiffs nor any of them, nor any owner or other person having any interest in any lot of land liable to assessment for said above mentioned work and improvement, has filed with the clerk of said city council any written notice specifying in what respect any of the acts and proceedings relating to said improvement are irregular, defective, erroneous or faulty.

Wherefore defendant prays that plaintiffs take nothing by this action and that it have judgment agaist plaintiffs for its costs of suit.

R. M. F. SOTO AND
JOHNSON & SHAW,
Attorneys for Marsh Bros. and Gardenier, Inc., a Corporation.

STATE OF CALIFORNIA,
County of Alameda, ss:

E. L. Marsh being duly sworn, deposes and says: That he is an officer, to-wit, the president of Marsh Bros. & Gardenier, Inc., one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof: and that the same is true of his own knowledge, except as to those matters
81 therein stated upon his information or belief, and that as to those matters he believes it to be true.

That said Marsh Bros. & Gardenier, Inc. is a corporation and affiant is president thereof and for that reason makes this verification for and in behalf of said corporation.

E. L. MARSH.

Subscribed and sworn to before me, this 28th day of June, A. D. 1916.

[SEAL.] J. P. SHAW,
Notary Public in and for the County of Alameda, State of California.

(Endorsed:) Filed Jun. 28, 1916, Geo. E. Gross, County Clerk, by J. Croter, Deputy Clerk.

Service of the within answer admitted by copy this day of June 28, 1916. C. IRVING WRIGHT,
Attorney for Plaintiffs.

[Title of Court and Cause.]

Stipulation as to Answers of City of Oakland et al.

82 It is stipulated by the respective parties to the action, that the answer of the defendant, Marsh Bros., and Gardinier, Inc., shall stand as the answer of each of the other defendants herein, and that the answers of the defendants, City of Oakland, Perry F. Brown, and F. A. Cooley, shall not be included in the judgment roll, but that this stipulation shall be inserted in lieu thereof.

Dated this 1st day of August, 1916.

C. I. WRIGHT,
L. D. MANNING,
F. E. BOLAND,
Attorneys for Plaintiffs.
JOHNSON & SHAW AND
R. M. F. SOTO,
Attorneys for Defendants Marsh Bros. & Gardenier, Inc.
PAUL C. MORF AND
WILLIAM H. O'BRIEN,
Attorneys for the Defendants City of Oakland, Perry F. Brown, as Superintendent of Streets of the City of Oakland, and F. A. Cooley, as Treasurer of the City of Oakland.

(Endorsed:) Filed Aug. 2, 1916, Geo. E. Gross, County Clerk, by J. Croter, Deputy Clerk.

83 [Title of Court and Cause.]

Additional Amendment to Amended Complaint.

Plaintiffs above named complaining of defendants above named, by leave of court first had and obtained, file this, their additional amendment to the amended complaint herein, and for cause of action further allege:

That in directing the superintendent of streets to make and record said assessment said council, by its said resolution of intention No. 9397 N. S., passed and adopted December 28, 1915, did not take into consideration the benefits to be derived by said land, or any thereof, within said district from said improvement; but on the contrary adopted and arbitrary scheme and method for levying and directing said assessment and arbitrarily and wilfully deprived plaintiffs herein and each of them of their property without due process of law, and in violation of Article XIV of amendments to the constitution of the United States.

And further that said council by its said resolution directing the making and recording of said assessment as aforesaid, did not provide that said assessment should be made upon the several parcels of land in said district in proportion to benefits; but on the
84 contrary arbitrarily and willfully disregarded both benefits and proportion of benefits, all in violation of said street "Improvement act of 1911."

That in directing the making and recording of said assessment said council by its last mentioned resolution, did not take into consideration all the land in said district; but on the contrary excluded from said assessment and from the operation thereof, and did not assess or direct to be assessed, the parcels of land designated on the street assessment diagram as Fern Path and Eucalyptus Lane. That said Fern Path and Eucalyptus Lane are not public streets, as said words are used in said resolution of intention No. 9397 N. S., nor within the meaning of said "Improvement act of 1911," nor otherwise nor at all, nor is either said Fern Path or Eucalyptus Lane by said resolution omitted from the assessment, nor is any declaration made therein respecting the same.

That the work of improvement described herein crosses the line of the Oakland, Antioch and Eastern Railroad at grade.

That said improvement was not completed until after the 18th day of August, 1915. That on said last named day said Oakland, Antioch and Eastern Railroad was in operation as an inter-
85 urban railroad carrying freight and passengers.

C. I. WRIGHT,
L. D. MANNING,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. Irving Wright, being first duly sworn, deposes and says:

That he is the attorney for the plaintiffs in the above entitled action; that he has read the foregoing additional amendment to the amended complaint herein and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief and as to those matters that he believes it to be true. That the reason that this verification is made by C. Irving Wright is that the facts alleged in said additional amendment to the amended complaint herein are within the knowledge of said C. Irving Wright.

C. IRVING WRIGHT.

Subscribed and sworn to before me this 7th day of August, 1916.

[SEAL.] JOHN E. MANDERS,
Notary Public in and for the City and County of San Francisco, State of California.

86 (Endorsed:. Filed Aug. 8, 1916, Geo. E. Gross, County Clerk, by J. Croter, Deputy Clerk.

Due service and receipt of a copy of the within amendment is hereby admitted this 8th day of August, 1916.

JOHNSON & SHAW,
Attorneys for Marsh Bros. & Gardenier, Inc.
PAUL C. MORF AND
WILLIAM H. O'BRIEN,
Attorneys for City of Oakland, Perry F. Brown and F. A. Cooley.

[Title of Court and Cause.]

Amendment to Answer of Marsh Bros. & Gardenier, Inc.

Marsh Bros. and Gardenier, Inc., a corporation, one of the defendants in the above entitled action, by leave of the court first had and obtained, makes and files this its amendment to its answer to the complaint of plaintiffs as amended by the amendment filed June 26th, 1916, and for further answer to said complaint alleges as follows, to-wit:

That on the 3rd day of June, 1914, Edith F. Wright and
87. Rockridge Place Company, a corporation, plaintiffs in the above entitled action made and filed with the clerk of the Council of said City of Oakland their petition in writing, whereby said Edith F. Wright and Rockridge Place Company petitioned and requested said council of said city to order the improvement of Broadway from Ocean View drive to the proposed extension of Shafter avenue and Temescal creek, by grading to the official grade, preparatory to later curbing, guttering, paving, with oil macadam, and constructing the necessary culvert in Temescal creek, provided that said work be done by a district assessment.

That thereafter said council of said City of Oakland pursuant to said petition and by its resolution of intention and order of work hereinbefore mentioned, ordered that said Broadway from Ocean View drive to Tesmescal creek, be graded to the official grade and that the necessary culvert be constructed in Temescal creek and made the cost and expenses of said work chargeable upon the district of lands mentioned in said resolution of intention.

That said portion of Broadway so ordered to be graded as aforesaid is the same portion of Broadway described and mentioned in said petition.

That by reason of the premises the said plaintiffs are and
88 each of them is now estopped from in any manner objecting, and ought not now be heard to object, to the order of work made by said council directing said work to be done as hereinbefore described, or to the jurisdiction and power of said council to make said order.

Wherefore defendant prays that plaintiffs take nothing by this action and that it have judgment for its costs.

JOHNSON & SHAW AND
R. M. F. SOTO,
Attorneys for March Bros. & Gardenier, Inc., Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

H. T. Gardenier being duly sworn, deposes and says: That he is an officer, to-wit, the secretary of Marsh Bros. & Gardenier, Inc., a corporation, one of the defendants in the above entitled action; that he has read the foregoing amendment to answer and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated upon his information or belief, and that as to those matters, he believes it to be true.

That affiant is secretary of said Marsh Bros. & Gardenier, a
89 corporation, and for that reason makes this verification for and in behalf of said corporation.

H. T. GARDENIER.

Subscribed and sworn to before me, this 7th day of August, A. D. 1916.

[SEAL.]

SID S. PALMER,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed Aug. 8, 1916. Geo. E. Gross, County Clerk, By J. Croter, Deputy Clerk.

Service of the within amendment admitted by copy this 8th day of August, 1916.

C. IRVING WRIGHT,
Attorney for Plaintiffs.

[Title of Court and Cause.]

Findings of Facts and Conclusions of Law.

The above entitled action came regularly on for trial before the court sitting without a jury (a trial by jury having been duly waived), on the 1st day of August, A. D. 1916, Mr. C. Irving Wright

and Mr. L. D. Manning appearing as attorneys for plaintiffs, and Mr. William H. O'Brien appearing as attorney for the de-
90 fendants City of Oakland, Perry F. Brown as superintendent of streets of the City of Oakland and F. A. Cooley as treasurer of said city, and Messrs. Johnson & Shaw and Mr. R. M. F. Soto appearing as attorneys for defendant Marsh Bros. and Gardenier, Inc.

Thereupon evidence, both oral and documentary, was offered and received on behalf of the respective parties, and the evidence being closed the cause was argued by the attorneys for the respective parties and submitted to the court for its consideration and decision.

And the court having duly considered the law and the evidence and being fully advised in the premises now makes the following findings of fact and conclusions of law in said cause:

Findings of Fact.

I.

That on the 14th day of December, 1914, the council of the City of Oakland passed and adopted a resolution of intention No. 9397 N. S. in the words and figures following, to wit:

Oakland City Council.

Resolution of Intention No. 9397, N. S.

Introduced by Commissioner Baccus.

Resolution of intention to improve Broadway between Patton
91 street and Ocean View drive, Patton street between Fifty-ninth street and Broadway, and a portion of a right of way granted by H. S. Patton to the City of Oakland.

Whereas, the public interest and convenience require that the work and improvement hereinafter described should be done, and

Whereas, in the opinion of this council said work and improvement is, and is hereby declared to be, of more than local or ordinary public benefit, now

Therefore the city council of the City of Oakland does hereby resolve and declare that it is the intention of said council to order the following work and improvement to be done in said city, to wit:

That Broadway from the production of the northeastern line of Patton street to a straight line drawn at right angles to the eastern line of Broadway at its intersection with the northern line of Ocean View drive, and Patton street from a line drawn parallel to and distant ten (10) feet southeasterly from the southeastern line of Fifty-ninth street to the western line of Broadway, each, be graded; also

That a concrete culvert, having a length of one hundred forty-two (142) feet (measured along its center line) and maximum internal dimensions of seven and one-half (7½) feet in height, by eight (8)

feet in width, be constructed so that the center line, bearing
92 north thirty-seven degrees thirty minutes east (N. 37° 30' E.) of said culvert passes through a point on the southwestern line produced of Patton street, distant thereon four hundred thirty-five (435) feet southeasterly from the southeastern line of Fifty-ninth street, and the northeastern and southwestern ends of said culvert are distant respectively (measured along the center line of said culvert), eighty (80) feet northeasterly, and sixty-two (62) feet southwesterly from said point on the southwestern line, produced, of Patton street; also

That a concrete curtain wall be constructed at each end and a concrete wing wall be constructed at the northeastern end of the aforedescribed concrete culvert; also

That two (2) brick manholes with cast iron tops be constructed as follows: one on the center line of the aforesaid culvert at a point distant, thereon, thirty-three (33) feet southwesterly from the northeastern end thereof; and one on the northeastern curb line of Patton street distant three hundred fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

That a brick storm water inlet with cast iron top be constructed on the southwestern curb line of Patton street distant three hundred fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

93 That a pipe conduit, having an internal diameter of fourteen (14) inches, be constructed from the first above named manhole to the second above named manhole; and a pipe conduit, having an internal diameter of ten (10) inches, be constructed from the second above named manhole to the aforesaid inlet;

Excepting, however, from the aforesaid work the grading of that portion of Broadway bounded as follows: on the northeast by the production of the southwestern line of Patton street; on the southeast by a straight line drawn from a point on the production of the southwestern line of Patton street distant, thereon, one hundred (100) feet southeasterly from the western line of Broadway to a point on the western line of Broadway, distant, thereon, three hundred twenty (320) feet southerly from the southwestern line of Patton street; and on the west by the western line of Broadway; also

Excepting such portions as are required by law to be kept in order or repair by any person or company having railroad tracks thereon.

All portions of the aforesaid culvert lying outside of Patton street and Broadway are within the right of way granted by H. S. Patton to the City of Oakland by that certain indenture recorded De-
94 cember 2, 1914, in volume 2284 of deeds, page 445, Alameda County records.

And said council does hereby determine and declare that the aforesaid work and improvement is of more than local or ordinary public benefit and will affect and benefit the district hereinafter described, which said district is hereby declared to be the district benefited by said work and improvement and that therefore the entire cost and expense of said work and improvement shall be and are hereby made chargeable against and shall be assessed upon said district, which dis-

trict is within the City of Oakland, County of Alameda, State of California, and is particularly bounded and described as follows, to wit:

Beginning at the intersection of the center line of Ocean View drive with the production of the western line of lot 18 of Hillside terrace, as said lot is shown on the map of "A redivision of Hillside Terrace," filed June 28, 1909, in book 24 of maps, page 80, Alameda County records; thence along the center line of Ocean View drive to the center line of Acacia avenue; thence along the center line of Acacia avenue to the center line of Brookside avenue; thence northwesterly along the center line of Brookside avenue to the center line of Chabot road, as said road is shown on the map of the "Resubdivision of blocks 9, 10, 11, 12, 13, 14 and a portion of block 16,
95 Rock Ridge Terrace," filed March 16, 1911, in book 26 of maps page 15, Alameda County records; thence along said center line of Chabot road to the center line of Buena Vista avenue; thence along said center line of Buena Vista avenue to the production of the northeastern line of lot 16, block 6, aforesaid resubdivision of blocks in Rock Ridge Terrace; thence along said production of and along said northeastern line of lot 16 to the northeastern boundary line of the aforesaid resubdivision of blocks in Rock Ridge Terrace; thence southeasterly along said last named boundary line to the angle point thereon at the northeastern line of said Chabot road; thence continuing southeasterly along said last named boundary line a distance of six hundred (600) feet; thence in a direct line to the most southern corner of lot 3 block H of the "Claremont Chabot Tract," as shown on a map thereof, filed June 23, 1913, in book 28 of maps, page 28, Alameda County records; thence along the eastern boundary line of said Claremont Chabot Tract to the southwestern line of the Tunnel road; thence along said southwestern line of the Tunnel road to the eastern boundary line of the City of Berkeley; thence southerly along said eastern boundary line to the southern boundary line of said City of Berkeley; thence westerly along
96 said southern boundary line of the City of Berkeley to the center line of Eucalyptus road; thence along said center line of Eucalyptus road to the production of the eastern line of lot S of the "Eucalyptus Hill Claremont" Tract, as said lot is shown on a map thereof, filed March 16, 1907, in book 22 of maps, page 51, Alameda County records; thence along said eastern line of lot S, and its production, to the center line of Harwood avenue; thence along the center line of Harwood avenue to the production of the eastern line of "Vernon Park," as said park is shown on a map thereof, recorded November 12, 1868, in book 34 of deeds, page 640, Alameda County records; thence along the production of and along said eastern line of "Vernon Park" to a point distant one hundred (100) feet northwesterly from the northwestern line of Shafter avenue; thence southwesterly parallel to the northwestern line of Shafter avenue to the production of the western line of the aforesaid lot 18 of Hillside Terrace; thence in a direct line to the point of beginning. Saving, excepting and excluding from the aforesaid district all public streets included and contained therein.

In this resolution whenever a distance from a line is given the distance measured at right angles to such line is meant unless otherwise stated.

97 This city council hereby determines that serial bonds shall be issued to represent assessments of twenty-five dollars or over for the cost of said work and improvement; said serial bonds shall extend over a period ending five years from the second day of January next succeeding the date of said bonds, and an even annual proportion of the principal sum thereof shall be payable by coupon, on the second day of January, every year after their date, until the whole is paid, and the interest shall be payable semi-annually by coupon, on the second days of January and July, respectively, of each year at a rate of seven per cent per annum on all sums unpaid, until the whole of said principal and interest are paid. Said bonds shall be issued in accordance with the provisions of an act of the legislature of the State of California, designated and referred to as the "Improvement act of 1911," and all acts amendatory thereof or supplementary thereto.

All the aforesaid work and improvement shall be done in accordance with the provisions of the above named "Improvement act of 1911," and all acts amendatory thereof or supplementary thereto; also in accordance with the plans and specifications made therefor by

98 Perry F. Brown, superintendent of streets and ex-officio city engineer of said City of Oakland, and adopted by resolution No. 9396 N. S. of this council

The Oakland Enquirer is hereby designated as the daily newspaper published and circulated in said city, in which this resolution of intention shall be published. The clerk of this council is hereby directed to publish this resolution by two successive insertions in said newspaper.

II.

That said resolution of intention was signed and attested by the clerk of said council and the mayor of said city and was published by said clerk in the form and manner as follows, to wit: said publication was on the 15th and 16th days of December, 1914, in said Oakland Enquirer, which was a newspaper published and circulated daily in said city.

III.

That immediately after the adoption of said resolution of intention, to wit: upon the 22nd day of December, 1914, the street superintendent of said city caused to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, and also along all the streets within the district of lands described

99 in said resolution of intention, at not more than three hundred feet in distance apart, but not less than three in all upon each street, notices of the passage of said resolution of intention, each of which said notices was headed "Notice of improvement,"

in letters of not less than one inch in length, and in legible characters, stated the fact of the passage of said resolution of intention, its date, and briefly the work or improvement proposed, and referred to the resolution of intention for further particulars.

IV.

That the said posting of said notices of the passage of said resolution of intention was completed on the 22nd day of December, 1914, and upon the completion of said posting of said notices, to wit: on the 22nd day of December, 1914, the superintendent of streets of said city caused to be filed and there was filed in the office of the city clerk of said city an affidavit stating that the posting of said notices of the passage of said resolution of intention was completed on December 22nd, 1914, and that said affidavit was made by one B. J. Nolan.

V.

That said affidavit did state that said notices were posted along the line of the whole of the work described in said resolution No. 9397 N. S., and did state the point of commencement of said post-
100 ing and did state the point of completion of said posting and did state that more than three notices were posted.

VI.

It is not true that said affidavit did not state or designate any street or streets, or the position or location upon the ground of any part or line of any street within the district of land described in said resolution No. 9397 N. S., along which any notice of passage of said resolution of intention No. 9397 N. S. had been posted, and it is not true that said affidavit did not state or designate the point of commencement or of completion of the posting on any street.

VI*a*.

That said affidavit did state and does state that copies of said notice of improvement were posted along all of the streets within the district of lands described in said resolution of intention, at not more than three hundred feet in distance apart, and that not less than three of said notices were posted along each of said streets.

VII.

That neither any owner or owners of property liable to be assessed for said work, nor any owner or owners of property within
101 said assessment district, did within fifteen days after the completion of the posting of said notices of improvement, make or file with the clerk of said council any written or other protest against the proposed work or against the extent of the district to be assessed, or both.

VIII.

That on the 28th day of January, 1915, between the hours of 11 o'clock A. M. and 12 o'clock noon, said defendant Marsh Bros. and Gardinier, Inc. delivered to the clerk of said council, its sealed proposal or bid to do said work, whereby said defendant offered to do said work and improvement fully in all respects as required by the specifications at the following prices, to wit:

Grading street, including sidewalk (cutting), 68 cents per cubic yard;
Culvert, concrete, $18.00 per linear foot;
14 inch conduit, $1.00 per linear foot;
10 inch conduit, 90 cents per linear foot;
Manholes, $50.00 each;
Storm water inlets, $45.00 each.

IX.

That said proposal or bid was accompanied by a check payable to said City of Oakland, duly certified by a responsible bank, for the sum of $2,700.00, which said amount was not less than ten
102 per cent of the aggregate of said proposal or bid.

X.

That on the 28th day of January, 1915, the said council of said City of Oakland, in open session, publicly opened and examined all said proposals or bids and publicly declared the same, and afterwards, to wit: on the 1st day of February, 1915, rejected all said proposals or bids other than the lowest regular proposal or bid of the responsible bidder next hereinafter mentioned, and by its resolution of award of contract number 9718 N. S. then and there passed by it, awarded the contract for said work or improvement to the lowest responsible bidder therefor, to wit: to said defendant Marsh Bros. and Gardenier, Inc., and at the prices named in its proposal or bid on file and hereinbefore specified.

XI.

That in the resolution last aforesaid, the said council of said city directed its clerk to post and publish notice of said award of contract in the manner next hereinafter described, and thereby caused due notice of the said award to said defendant Marsh Bros. and Gardenier, Inc. to be posted and kept posted conspicuously for five full days near the chamber door of said council, to wit: from the
103 2nd day of February, 1915, to the 8th day of February, 1915, both days included, and to be published twice, to wit: on the 2nd and 3rd days of February, 1915, in said Oakland Enquirer, which was a daily newspaper, published and circulated in said city,

and designated by said council for that purpose, and that said notice was so published, kept posted and published.

XII.

That on the 17th day of February, 1915, and not at any other time, said Perry F. Brown, as superintendent of streets of said city, in his official capacity, did then and at his office, and in pursuance of said above mentioned award, enter into a written contract for said work and improvement with said Marsh Bros. and Gardenier, Inc., who was the original bidder to whom said contract had been awarded, and at the prices aforesaid specified in its said bid, and therein fixed the time for beginning said work to be on the 19th day of February, 1915, and the time for completing said work to be within one hundred and twenty days thereafter; and wherein and whereby said Marsh Bros. and Gardenier, Inc., agreed that it would do and perform all said work according to said specifications therein and hereinbefore mentioned, and under the direction and to the satis-
104 faction of said street superintendent, and that the materials used should comply with the specifications and be to the satisfaction of said street superintendent, and said contract also contained express notice that in no case except where it is otherwise provided by law or the charter of the said city, would the city or any officer thereof be liable for any portion of the expense or for any delinquency of persons or property assessed.

XIII.

That previous to the execution of said contract said defendant Marsh Bros. and Gardenier, Inc. advanced to the superintendent of streets of said city the sum of $1,719.07 for payment by it of the cost of publication of the notices, resolutions, orders and all incidental expenses and matters required under the proceedings prescribed in said "Improvement act of 1911", and of such other notices as might be deemed requisite by said council, together with all other incidental expenses.

XIV.

That before executing said contract and on the 17th day of February, 1915, said defendant Marsh Bros. and Gardenier, Inc. filed with the superintendent of streets of said city a good and sufficient bond executed and signed by said defendant and a sufficient
105 surety, to wit: United States Fidelity and Guaranty Company, a corporation, in the sum of $14,000.00 (being not less than one-half of the total amount payable by the terms of said contract) and which bond was approved by the mayor of said city. That said bond by its terms was made to inure to the benefit of any and all persons, companies or corporations who should perform labor on or furnish materials to be used in said work and improvement and provided that if said Marsh Bros. and Gardenier, Inc. shall fail

to pay for any materials so furnished for said work or improvement, or for any work or labor done thereon of any kind, said surety would pay the same to an amount not to exceed the amount specified in said bond.

XV.

That at the time of entering into said contract said defendant Marsh Bros. and Gardenier, Inc., also executed a good and sufficient bond of even date therewith, conditioned for the faithful performance of said contract, and said bond was to the satisfaction and approval of said street superintendent with a sufficient surety, to wit: United States Fidelity and Guaranty Company, a corporation, and payable to said city in the sum of $7,000.00 (being not less than twenty-five per cent of the amount of said contract); and
106 that said bond was duly received by said superintendent of streets and filed in his office as a record.

XVI.

That said defendant Marsh Bros. and Gardenier, Inc., commenced said work on the 19th day of February, 1915, and did and caused to be done all the work in said contract and specifications mentioned, and duly performed on its part in every respect the said work according to the said specifications and the terms of said contract, and with materials complying with the specifications, all under the direction and to the satisfaction of said superintendent of streets, and that the said work was duly approved and accepted by said superintendent of streets, who thereupon proceeded to estimate upon the lands, lots or portions of lots within said assessment district as shown by the diagram hereinafter mentioned, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece or subdivision of land, and who thereupon proceeded to make his assessment, and thereupon assessed upon and against said lands in said assessment district the total amount of all said work proposed, performed and in said contract specified, with the incidental expenses, to wit: the sum of $27,978.68 the several pieces, par-
107 cels, lots or portions of lots and subdivisions of land in said district benefited thereby, to wit; upon each respectively in proportion to the estimated benefits to be received by each of said lots, portions of lots, or subdivisions of land; and that said assessment briefly referred to the contract, the work contracted for and performed, and showed the amount to be paid therefor, together with any incidental expenses, the amount of each assessment, the name of the owner of each lot or portion of lot assessed, if known to the street superintendent, but, when the name was unknown to him, the word "unknown" was written opposite the number of the lot, and the amount assessed, thereon, the number of each lot, or portion or portions of lots assessed, which assessment was signed by said street superintendent and had attached thereto a diagram exhibiting each street and street crossing, lane, alley, place or court, on which any work had

been done, and showing the relative location of each lot or portion of lot to the work done, and numbered to correspond with the numbers in the assessment, and showing the number of feet fronting, or number of lots assessed for said work contracted for and performed, which diagram was also signed by the said superintendent of streets;

and that to said assessment was also attached a warrant, which
108 was signed by the superintendent of streets and countersigned by the mayor of said city, which said warrant contained a notice that serial bonds bearing interest at the rate of seven per cent per annum and extending over a period ending five years from and after the 2nd day of January next succeeding the date of said bonds, an even annual proportion of the principal sum thereof, payable by coupon on the 2nd day of January every year after their date, and the interest payable semi-annually by coupon on the 2nd days of January and July respectively of each year, would be issued to represent the cost and expense of the work described in the assessment, and further contained notice that a bond in such series would issue to represent assessments of $25.00 or more, remaining unpaid for thirty days after the date of said warrant or five days after the decision of the city council of said city of Oakland upon an appeal; and that all of said assessment roll was duly made in the manner and form perscribed by law.

XVII.

It is not true that the said superintendent of streets made an assessment of the amount to be paid by the owners of the several pieces of land designated on the diagram mentioned in plaintiff's

complaint, or made any assessment except the assessment
109 hereinbefore found to have been made.

XVIII.

That said warrant, assessment and diagram hereinbefore mentioned in finding XVI hereof together with the certificate of the city engineer of the quantity and character of the work done, were duly made and recorded on the 8th day of September, 1915, in the office of said superintendent of streets in a book kept by him for that purpose, to wit: Book 13 of street assessments, page 1, and following, and the record thereof was duly signed by said street superintendent in his official capacity and said diagram was filed in the office of said superintendent of streets of said city on said date.

XIX.

That no assessment, warrant, diagram or certificate of the city engineer were at any time made or recorded in the office of said superintendent of streets except the assessment, warrant diagram and engineer's certificate mentioned in finding XVIII hereof.

XX.

That on the 8th day of September, 1915, the said superintendent of streets issued and delivered said warrant, assessment, cer-
110 tificate and diagram mentioned in finding XVIII hereof to said defendant Marsh Bros. and Gardenier, Inc., all of which instruments were dated on the day last aforesaid, except said certificate which was dated August 2nd, 1915, and had been recorded and certified on each as recorded by said street superintendent; and by virtue of said warrant said defendant Marsh Bros. and Gardenier, Inc., its agents and assigns, were authorized to demand and receive the amount of the several assessments made to cover the sums due for the work specified in said contract and assessment.

XXI.

That said superintendent of streets did not at any time issue or deliver to said Marsh Bros. and Gardenier, Inc., any warrant assessment or certificate or diagram, except the warrant, assessment, certificate and diagram mentioned in finding XVIII hereof.

XXII.

That with thirty days after the date of said warrant mentioned in finding XVIII hereof, E. L. Marsh, who then and at all times hereinafter mentioned was the duly authorized agent of said defendant Marsh Bros. and Gardenier, Inc., in behalf of said defendant, did publicly demand payment on each of the lots or prem-
111 ises assessed for the exact amount separately assessed against said lot of land.

XXIII.

That on the 8th day of October, 1915, and within thirty days after the date of the warrant mentioned in finding XVIII hereof, the said E. L. Marsh in behalf of said defendant, did return said warrant, assessment certificate and diagram mentioned in finding XVIII hereof, to the said street superintendent at his office, with a return endorsed upon said warrant, signed by said E. L. Marsh, and verified by his oath, duly administered by a competent person, which return stated the nature and character of the demand, how and when and upon whom made, and by its number upon what lot made, and whether any of the assessments remained unpaid in whole or in part and the amount thereof; and that upon the 8th day of October, 1915, the said street superintendent did record the said return in the margin of the record of the warrant and assessment, and also the original contract referred to therein, all at full length, in the books kept by him for that purpose in his office, and thereupon signed the said record.

XXIV.

That said defendant did not return any warrant except the warrant mentioned in finding XVIII hereof.

112 XXV.

That on the 7th day of October, 1915, Oakland Antioch and Eastern Railway, a corporation, the owner of certain land within said district appealed to said council of said city from said assessment mentioned in finding XVIII hereof, by briefly stating its objections in writing and filing the same with the clerk of said council.

That on the 6th day of October, 1915, Charles Butters the owner of certain lands within said district, appealed to the council of said city from said assessment mentioned in finding XVIII hereof, by briefly stating his objections in writing and filing the same with the clerk of said council.

That on the 5th day of October, 1915, A. J. Brockelhurst, W. A. Pryal, J. A. C. Macdonald, Catherine Heimbold, Gustav Brause, E. Spiganoviz, Florence D. Marx Greene, Wesley Plunkett, Fay M. Oliphant, Geo. M. Mott, Jr., Guy Hyde Chick, John Reyes James Kirkland F. B. Norton, W. W. Norton, Geo. Robinson and Marian L. Stebbins, severally the owners of certain lots of land within said district, appealed to said council from said assessment mentioned in finding XVIII hereof by briefly stating their objections in writing and filing the same with the clerk of said council.

113 That on the 14th day of October, 1915, the said council of said city by its resolution No. 11520 N. S. duly passed and adopted by it on said last mentioned day, fixed October 21st, 1915, at the hour of eleven o'clock and twenty-five minutes A. M. of said day as the time, and the council chamber of said council in the city hall of said City of Oakland as the place of hearing said appeals and directed its clerk to post notice of the time and place of said hearing as so fixed, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, conspicuously, near the chamber door of said council, for five full days.

That on said 14th day of October, 1915, and pursuant to said resolution last aforesaid, said clerk of said council conspicuously posted on the bulletin board near the chamber door of said council, notice of the time and place of hearing said appeals as fixed by said council as aforesaid, briefly referring to the work contracted to be done or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, and kept said notice so conspicuously posted for five full days thereafter.

114 That on the 21st day of October, 1915, at the hour of 11:25 o'clock A. M. of said day, said council of said city duly and regularly continued the hearing of said appeals to the 28th day of December, 1915, and thereafter on said December 28th, 1915, said council duly heard said appeals and thereupon by its resolution No.

11903 N. S. passed and adopted on said day, set aside said assessment and warrant above mentioned, and by its resolution last aforesaid found and determined the total cost and expense of said work to be the sum of $27,978.68 and directed said superintendent of streets to make and issue to said Marsh Bros. and Gardenier, Inc., a new warrant and assessment and diagram and to assess the sum of $27,978.68 upon the subdivisions of land designated upon said diagram of said asesssment district approved by resolution No. 11025 N. S.

That said resolution No. 11903 N. S. by its terms provided that in the table of assessments therein set forth, the figures under the heading "Number of lot on diagram" in each case was used to describe a particular lot of land in said assessment district as said lot of land was correspondingly numbered upon the diagram approved by said council on July 6, 1915, by resolution No. 11025 N. S. and filed on September 8th, 1915, in the office of the superinten-
115 dent of streets and recorded in said office with said above mentioned warrant and assessment in volume 13 of street assessments of said city at page 1 thereof and following, and that the amount which should be assessed upon and against each lot of land by said superintendent of streets in making said new assessment was set opposite the number of said lot and under the heading "Amount of Assessment," and that upon said diagram the number of each of said lots of land was denoted by a figure or figures enclosed by a circle.

XXVI.

That said new warrant, assessment and diagram if made and recorded as threatened by defendants will not consti-ute a cloud on the title to the lands of plaintiffs mentioned in the complaint, but that if said new warrant, assessment and diagram be made, issued and recorded in accordance with said resolution of said council, the same will constitute and create valid liens upon said lands.

XXVII.

That defendant Perry F. Brown as superintendent of streets of said city of Oakland has not threatened and does not now threaten to issue to the treasurer of said city a certificate of the assessments un-
116 paid, and that said Perry F. Brown will not make or issue said certificate or threaten to make or issue the same until after the full expiration of thirty days from the date of said new warrant, and after the street superintendent shall have recorded the return as provided in section 25 of the "Improvement act of 1911."

XXVIII.

That defendant Marsh Bros. and Gardenier, Inc., has not threatened or does not now threaten to apply to the treasurer of the City of Oakland for the issuance of bonds upon the lands of plaintiffs, and that said defendant will not threaten to apply and will not apply to said treasurer for the issuance of bonds upon any assessment or assess-

ments mentioned in said new assessment, until after said street superintendent shall make and certify to said city treasurer said list of assessments remaining unpaid.

XXIX.

That said bonds if made and issued after the making and certifying of said list of assessments unpaid, will not constitute a cloud upon the title to the lands of plaintiff, but that said bonds if so made and issued, will constitute valid liens upon the lands of plaintiffs.

117 XXX.

It is not true that no notice by posting was given after the adoption of the resolution mentioned in paragraph twelfth of plaintiff's complaint, as required by section 5 of the improvement act of 1911.

XXXI.

It is not true that said superintendent of streets did not or that any other person did not, immediately or within a reasonable time after the adoption of said resolution of intention, post or cause to be posted along the line of said proposed work, or along any street or streets in the proposed district chargeable with said work, any notice or notices of said resolution of intention.

XXXII.

It is not true that said street superintendent did not or that any other person did not at any time after the adoption of said resolution of intention, post or cause to be posted along the line of said proposed work and on any street or streets, or on any street or streets in the proposed district chargeable with said work, any notice or notices stating briefly the work or improvement proposed by said resolution of intention.

118 XXXIII.

It is not true that said street superintendent did not, or that any other person at any time did not, conspicuously, or otherwise, post or cause to be posted any such notice or notices along all the streets within such district at not more than three hundred feet in distance apart and it is not true that said superintendent of streets or any other person did not post such notices, not less than three in all, on each street in said district.

XXXIV.

It is not true that neither said resolution of intention nor said resolution ordering and directing the work nor did any notice of said resolution or of either of them, sufficiently or at all describe the work or improvement therein mentioned, and it is not true that no juris-

diction was acquired by said council to award any contract for said work or improvement.

XXXV.

That at all times mentioned in plaintiff's complaint the charter of said City of Oakland provided that whenever in the judgment of the council, the cost and expense of any street work or improvement should be paid by special assessment on private property, the general laws of the State of California in force at the time of the im-
119 provement shall govern and control, and all proceedings shall be in conformity thereto.

That the "Improvement act of 1911" under which said proceedings for said street improvement were had and taken, do not provide or require that any bid or proposal made or filed under the provisions of said act for the construction of any street work or improvement should have thereon or therewith any affidavit whatever. That no affidavit whatever was filed with or accompanied the bid or proposal of Marsh Bros. and Gardenier, Inc., aforesaid.

XXXVI.

That the charter of said City of Oakland did not at any of the times mentioned in plaintiffs' complaint provide or require that the said bid of said Marsh Bros. and Gerdenier, Inc., should have thereon or therewith the affidavit mentioned in section 126 of article XIX of said charter, or any affidavit.

XXXVII.

It is not true that said bid, or that said contract let thereunder, or that all or any of the proceedings subsequent thereto, was or were absolutely void or void at all.

120 XXXVIII.

It is not true that in making the expense of said work or improvement chargeable upon the district described in said resolution of intention, or in making or delineating the district, the said city council did not take into consideration the lands to be benefited by said work or improvement, and it is not true that said city council arbitrarily or willfully excluded, or excluded at all from said district, lots or parcels or pieces of land equally to be benefited by said proposed work or benefited at all, and it is not true that said council arbitrarily or wilfully discriminated or discriminated at all against the owners of lots or pieces or parcels of land included within the district described in said resolution of intention, or discriminated against any owner or against any person at all, and it is not true that said city council denied to the owners of said lots or pieces or parcels of land in said district or to any of them, the equal or any protection of the laws.

XXXIX.

It is not true that the result or effect of any act or proceeding of said city council mentioned in plaintiffs' complaint, was to deprive said owners or any owner or owners, of their property without due process of law, and it is not true that any act or proceeding of
121 said city council mentioned in plaintiffs' complaint was in violation of the fourteenth amendment to the constitution of the United States.

XL.

That plaintiffs above named at all of the times mentioned in plaintiffs' complaint were, and now are the owners of lots and parcels of land situate and being within the district described in the resolution of intention above set forth as being assessable for such work, and that said land of plaintiffs, and of each of them, has been directed to be assessed as aforesaid, and said superintendent of streets threatens to assess the same and each parcel thereof; that said land has been delineated upon and described by a descriptive assessment number enclosed by a circle on the diagram filed and recorded in the office of the said superintendent of streets in volume 13 of street assessments at page 1.

That plaintiff, Charles Butters, at all of the times herein mentioned was, and now is, the owner of all those lots designated on said diagram by the assessment numbers 46, 47, 48, 337, 338½, 339 and 389.

That plaintiff Edith F. Wright at all of the times mentioned in plaintiffs' complaint was, and now is, the owner of all those lots designated on said diagram by the assessment numbers 1, 2, 3, 50,
122 76 to 89 both inclusive, 91 and 92.

That plaintiff Rockridge Place Company at all of the times mentioned in plaintiffs' complaint was, and now is, the owner of all that lot designated on said diagram by the assessment No. 49.

That plaintiff Berkeley Rock Company at all of the times mentioned in plaintiffs' complaint was, and now is, the owner of all those lots designated on said diagram by the assessment Nos. 52 53 and 55.

That plaintiff Amelia J. Brocklehurst at all of the times mentioned in plaintiffs' complaint was, and now is, the owner of all those lots designated on said diagram by the assessment Nos. 271, 272, 273 and 274.

That plaintiff Gus Brause at all of the times mentioned in plaintiffs' complaint was, and now is, the owner of all those lots designated on said diagram by the assessment Nos. 250, 254 and 255.

That plaintiff Mary A. MacDonald at all of the times mentioned in plaintiffs' complaint was, and now is, the owner of all that lot designated on said diagram by the assessment No. 319.

123 XLI.

It is not true that at no time prior to the adoption and passage of said resolution of intention No. 9397 N. S. was any grade fixed or

established by said city council or the City of Oakland, on said Broadway between a point thereon distant northerly 695 feet from the southern line of Keith avenue produced easterly and the center line of Temescal creek, or on any part or portion thereof.

XLII.

It is not true that at no time prior to the adoption and passage of said resolution of intention No. 9397 N. S., was any grade fixed or established by said city council or the City of Oakland, on said Patton street or on any part or portion thereof.

XLIII.

It is not true that ordinance No. 749 N. S. mentioned in plaintiffs' complaint was or is void, or of no effect, and it is not true that said ordinance No. 749 N. S. contains and embraces more than one subject, or that said ordinance is not confined to one subject, or that said ordinance is in violation of subdivision 4 of section 46 of article VIII of the charter of the City of Oakland, or that said ordinance is in violation of section 51 of article IX of the charter of said
124 City of Oakland.

XLIV.

It is not true that said ordinance No. 749 N. S. attempted to change a grade theretofore established on said Broadway between said Keith avenue and a point 695 feet northerly from the north return northwest corner of said Keith avenue and Broadway, or attempted to change any grade of any street or of any portion thereof.

XLV.

It is not true that said ordinance No. 749 N. S. attempted to change the grade theretofore established on said Broadway by ordinance 537 N. S. entitled, "an ordinance establishing official curb grades and positions of curbs from Keith avenue northerly" passed, adopted and approved by said city council on October 14th, 1913, or attempted to change any grade theretofore established on Broadway by any ordinance of said City *of* Council, or attempted to change any grade at all.

XLVI.

It is not true that the purported and attempted change of grade mentioned in plaintiffs' complaint is a subject embraced in said ordinance No. 749 N. S., and in this behalf the court finds that
125 said ordinance does not by its terms, or otherwise or at all, purport to change or attempt to change any grade of any street at all, and that the change of the grade of any street or portion thereof, is not mentioned in said ordinance.

XLVII.

That defendant F. A. Cooley as treasurer of said City of Oakland has not threatened and does not threaten to issue said bonds and that said defendant F. A. Cooley as such treasurer will not threaten to issue and will not issue said bonds until after said street superintendent of said city shall have made and certified to him a list of all assessments remaining unpaid.

XLVIII.

That more than ten days have elapsed since the date of the first publication of said notice of award of contract above mentioned, and neither the plaintiffs nor any of them, nor any owner or other person having any interest in any lot of land liable to assessment for said above mentioned work and improvement, has filed with the clerk of said city council any written notice specifying in what respect any of the acts and proceedings relating to said improvement are irregular, defective, erroneous or faulty.

126 XLIX.

That in and by said ordinance No. 749 N. S. entitled "An ordinance establishing the name of Patton street to a certain street heretofore accepted by the city council by its resolution No. 8427 N. S.; also establishing official curb grades and positions of curbs on Broadway between Keith avenue and Temescal creek and on said Patton street between Broadway and Fifty-ninth street," passed, adopted and approved November 30, 1914, said council of said City of Oakland did fix and establish certain grades on said Broadway street and on said Patton street.

Conclusions of Law.

As conclusions of law from the foregoing facts the court now finds and decides:

1.

That plaintiffs are not entitled to take anything by this action.

2.

That defendants are entitled to judgment and decree that said resolution of intention No. 9397 N. S. passed and adopted by the council of said City of Oakland on the 14th day of December, 1914, and the said notice of improvement posted by the street
127 superintendent of said city, and said posting thereof, and said affidavit of said posting of said notice of improvement, and said resolution No. 9561 N. S. ordering the work to be done

passed and adopted by said council on the 11th day of January, 1915, and said notice inviting sealed proposals or bids for said work and said publication thereof and said posting thereof with specifications, and said resolution No. 9718 N. S. awarding the contract for said work to the defendant Marsh Bros. and Gardenier, Inc., passed and adopted by said council on the 1st day of February, 1915, and said notice of award of said contract and the posting and publication thereof, and said contract to do said work entered into on February 17th, 1915, by said Marsh Bros. and Gardenier, Inc. and said Perry F. Brown as superintendent of streets of said city, and said bond for the faithful performance of said contract and said bond for labor and materials executed with said contract, and the assessment roll consisting of the engineer's certificate, assessment, warrant, diagram and contractor's return endorsed thereon and the recordation of said assessment roll and of said contractor's return, were all severally duly made, taken and had pursuant to and in strict compliance with the "Improvement act of 1911."

That said assessment roll with said contractor's return con-
128 stituted valid liens upon the real property within the assessment district therein described, and so continued to be until said council of said city by its resolution No. 11903 N. S. passed and adopted on the 28th day of December, 1915, set aside said assessment and ordered and directed the superintendent of streets of said city to make and issue to said defendant Marsh Bros. and Gardenier Inc., a new warrant, assessment and diagram; and that said resolution No. 11903 N. S. was duly given and made by said council, and that said defendant Marsh Bros. and Gardenier Inc. is entitled to have issued to it by said street superintendent of said city, a new warrant, assessment and diagram pursuant to and in accordance with said resolution No. 11903 N. S.

That the preliminary injunction heretofore issued by this court in this action be dissolved.

3.

That defendants are severally entitled to recover of and from plaintiffs, their costs of suit incurred in this action.

Let judgment be entered accordingly.

Dated: October 27, 1916.

FRED V. WOOD,
Judge of the Superior Court.

129 [Endorsed:] Filed Nov. 2, 1916. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy Clerk.

[Title of Court and Cause.]

Judgment.

The above entitled action came regularly on for trial before the court sitting without a jury (a trial by jury having been duly waived), on the 1st day of August, A. D. 1916, Mr. C. Irving Wright

and Mr. L. B. Manning appearing as attorneys for plaintiffs, and Mr. William H. O'Brien appearing as attorney for the defendants City of Oakland, Perry F. Brown as superintendent of streets of the City of Oakland and F. A. Cooley as treasurer of said city, and Messrs. Johnson & Shaw and Mr. R. M. F. Soto appearing as attorneys for defendant Marsh Bros. and Gardinier, Inc.

Thereupon evidence, both oral and documentary, was offered and received on behalf of the respective parties, and the evidence being closed the cause was argued by the attorneys for the respective parties and submitted to the court for its consideration and decision.

130 And the court having duly considered the law and the evidence and being fully advised in the premises made and filed herein its written findings of fact and conclusions of law and therein ordered that judgment be entered herein in accordance therewith and as therein directed.

Now, therefore, by reason of the law and the premises it is hereby ordered, adjudged and decreed as folows, to wit:

First. That plaintiffs are not entitled to take anything by this action.

Second. That resolution of intention No. 9397 N. S. passed and adopted by the council of the City of Oakland on the 14th day of December, 1914, mentioned and described in the answer of Marsh Bros. and Gardenier, Inc. on file herein, and the notice of improvement posted by the street superintendent of said city, and said posting thereof, and the affidavit of said posting of said notice of improvement, mentioned and described in said answer, and resolution No. 9561 N. S. ordering the work to be done, passed and adopted by said council on the 11th day of January, 1915, and the notice inviting sealed proposals or bids for said work and the publication and posting thereof with specifications, mentioned and described

131 in plaintiffs amended complaint, and resolution No. 9718 N. S. awarding the contract for said work to the defendant Marsh Bros. and Gardenier, Inc., passed and adopted by said council on the 1st day of February, 1915, mentioned and described in said answer, and the notice of award of said contract and the posting and publication thereof, mentioned and described in said answer, and the contract to do said work entered into on February 17th, 1915, by said Marsh Bros. and Gardenier, Inc. and Perry F. Brown, as superintendent of streets of said city, mentioned in said answer, and the bond for the faithful performance of said contract, and the bond for labor and materials executed with said contract, mentioned and described in said answer, and the assessment roll consisting of the engineer's certificate, assessment, warrant, diagram and contractor's return endorsed thereon and the recordation of said assessment roll and of said contractor's return, mentioned and described in said answer, were all severally duly made, taken and had, pursuant to and in strict compliance with the "Improvement act of 1911."

That said assessment roll with said contractor's return constituted valid liens upon the real property within the assessment district

therein described, and so continued to be until said council of said City of Oakland by its resolution No. 11903 N. S. passed and
132 adopted on the 28th day of December, 1915, set aside said assessment and ordered and directed the superintendent of streets of said city to make and issue to said defendant Marsh Bros. and Gardenier, Inc., a new warrant, assessment and diagram; and that said resolution No. 11903 N. S. was duly given and made by said council, and that said defendant Marsh Bros. and Gardenier, Inc., is entitled to have issued to it by said street superintendent of said city, a new warrant, assessment and diagram pursuant to and in accordance with said reso-tion No. 11903 N. S. of said council of said city.

That the preliminary injunction heretofore issued in this action be and the same is hereby dissolved.

Third. That defendant Marsh Bros. and Gardenier, Inc., do have and recover of and from the plaintiffs in this action, its costs of suit hereby taxed at the sum of $36.00.

Fourth. That the defendant City of Oakland, a municipal corporation do have and recover of and from the plaintiffs in this action its costs of suit hereby taxed at the sum of $—.

Fifth. That defendant Perry F. Brown, as superintendent of streets of said City of Oakland, do have and recover of and
133 from the plaintiffs in this action his costs of suit hereby taxed at the sum of $—.

Sixth. That defendant F. A. Cooley, as treasurer of the City of Oakland do have and recover of and from the plaintiffs in this action, his costs of suit hereby taxed at the sum of $—.

Done in open court this 2nd day of November, A. D. 1916.

FRED V. WOOD,
Judge of the Superior Court.

(Endorsed:) Filed Nov. 2, 1916. Geo. E. Gross, County Clerk. By W. E. Adams, Deputy Clerk.

Entered Nov. 3, 1916, judgment record No. 117, page 304.

GEO. E. GROSS,
County Clerk,
By M. P. HENRY,
Deputy Clerk.

[Title of Court and Cause.]

Clerk's Certificate to Judgment Roll.

I, Geo. E. Gross, county clerk of the County of Alameda, State of California and ex-officio clerk of the Superior Court of the State of California in and for the County of Alameda, do hereby
134 certify that the papers hereto attached constitute the judgment roll in the above entitled action.

Given under my hand and the seal of the Superior Court of the State of California in and for the County of Alameda this 3rd day of November, A. D. 1916.

[SEAL.]

GEO. E. GROSS,
Clerk,
By H. HENNINGSEN,
Deputy.

Judgment recorded in judgment book 117, page 304.
(Endorsed:) Filed Nov. 3, 1916. Geo. E. Gross, County Clerk. By H. Henningsen, Deputy.

[Title of Court and Cause.]

Notice of Appeal.

Notice is hereby given that the plaintiffs above named do, and each of them does hereby appeal to the Supreme Court of the State of California from all that certain judgment heretofore rendered and made in the above entitled action in favor of defendants and against the plaintiffs.

Dated February 26, 1917.

C. IRVING WRIGHT,
L. D. MANNING,
F. E. BOLAND,
Attorneys for Plaintiffs.

135

(Endorsed.)

Due service and receipt of a copy of the within notice of appeal is hereby admitted this 26th day of February, 1917.

PAUL C. MORF,
WILLIAM H. O'BRIEN,
Attorneys for Certain Defendants.

Received a copy of the within notice of appeal this 26th day of February, A. D. 1917.

R. M. F. SOTO AND
JOHNSON & SHAW,
Attorneys for Marsh Bros. & Gardenier, Inc., Defendant.

Filed Feb. 26, 1917.

GEO. E. CROSS,
County Clerk,
By H. HENNINGSEN,
Deputy.

[Title of Court and Cause.]

Engrossed Bill of Exceptions.

Be it remembered that the above entitled action came on regularly for trial before the above entitled court, department No. 1 thereof, without a jury, on the 1st day of August, 1916, C. Irving Wright, F. E. Boland and L. D. Manning, Esqs., appearing as
136 attorneys for plaintiffs; Wm. H. O'Brien, Esq., appearing as attorney for defendant City of Oakland, Perry F. Brown, as superintendent of streets of the City of Oakland, and F. A. Cooley, as treasurer of said city; and Messrs. Johnson and Shaw and R. M. F. Soto, Esq., appearing as attorneys for defendants Marsh Bros. and Gardenier, Inc.

Thereupon the following proceedings were had, testimony given evidence introduced, and objections and rulings thereon made.

W. W. CHAPPELL, being called as a witness on behalf of the plaintiffs, and being duly sworn, testified as follows:

I am deputy city clerk of the City of Oakland and as such have charge of the records. I have ordinances No. 749 N. S., No. 537 N. S., No. 573 N. S. and No. 3091 with me.

Plaintiffs offered and there was received in evidence and marked

"PLAINTIFFS' EXHIBIT No. 1"

ordinance No. 749, N. S., said ordinance being in the words and figures following, to wit:

137 *Ordinance No. 749, N. S.*

An Ordinance Establishing the Name of Patton Street to a Certain Street heretofore Accepted by the City Council by Its Resolution No. 8427, N. S.; also Establishing Official Curb Grades and Positions of Curbs on Broadway between Keith Avenue and Temescal Creek and on said Patton Street between Broadway and Fifty-ninth Street.

Be it ordained by the council of the City of Oakland, as follows:

Section 1. That that certain public street heretofore accepted for and in behalf of the City of Oakland by resolution No. 8427 N. S. of this council (said street being plot No. 4, as said plot is shown on the map accompanying the report of the referee in the case of McMahon vs. Pryal, case No. 36,166, in the Superior Court of the County of Alameda, State of California) be and the same is hereby named Patton street.

Section 2. The official curb grades and positions of curbs on Broadway, between the southern line of Keith avenue produced east-

KEITH AVENUE

BROADWAY

OCEAN VIEW DRIVE

MAP SHOWING

OFFICIAL GRADES AND POSITIONS OF CURBS

ON

BROADWAY

BETWEEN KEITH AVENUE AND A POINT

695 FEET NORTHERLY FROM THE NORTH RETURN

NORTHWEST CORNER OF KEITH AVENUE AND BROADWAY.

OAKLAND, CAL.
Sept 27, 1913

PERRY F. BROWN
Superintendent of Streets
and Ex-officio City Engineer

EXPLANATION:—

Curb lines are shown hereon by light lines and property lines by heavy lines.

Figures written hereon thus: ——— denote grade elevations in feet and decimal fractions thereof above OAKLAND CITY DATUM for the top of the curb at the points indicated by the respective crosses. Where the letter "R" is written immediately after the figures showing the elevations the indicated point is hereby declared to be the return.

The word "Return" as used hereon means the point of tangency of the straight curb with the curved curb. At the corner, said curved curb being circular and tangent to the straight curbs of the two intersecting streets, and having a radius equal to the width of the narrower of the intersecting sidewalks, except where the radius is specifically indicated otherwise. By the word sidewalk as used hereon is meant the entire space between the property line and the curb line nearest thereto.

Elevations shown hereon are for curbs of granite, cement or concrete. Wooden curbs are to be two(2) inches lower.

Curb grades are to be straight between consecutive points shown hereon, which means that the rate of inclination is to remain, in each particular case, constant from one such point to the next thereto.

The figures indicating the position of the curbs are hereby declared to show the position of the outer or roadway edge thereof.

Abbreviations used hereon are as follows:— ' means feet, 20' means 20 feet; ° means degrees, 30° means 30 degrees, Rad means Radius; R means Return

1384

erly, and the center line of Temescal creek and on Patton street between the eastern line of Broadway and the northern line of Fifty-ninth street, are hereby fixed and established as shown upon that certain map entitled "Map showing official grades and positions
138 of curbs on Broadway between Keith avenue and Temescal creek and on Patton street between Broadway and Fifty-ninth street, Oakland, Cal., November 19, 1914. Perry F. Brown, superintendent of streets and ex-officio city engineer" filed in the office of the city clerk of said city on the 20th day of November, 1914.

Section 3. All ordinances or parts of ordina-ces in conflict herewith are hereby repealed.

Section 4. This ordinance shall take effect immediately.

In council, Oakland, Cal., November 30, 1914.

Passed by the following vote:

Ayes: Commissioners Forrest, Turner and President Mott—3. Noes—None. Excused from voting—None. Absent—Commissioners Anderson and Baccus—2.

Attest:

FRANK K. MOTT,
Mayor of the City of Oakland.

Attest:

FRANK M. SMITH,
City Clerk and Clerk of the Council of the City of Oakland, Calif.

[Inserted in original transcript on file with the clerk of the Supreme Court.]

(Here follows map marked page 138½.)

139 Plaintiffs offered and there was received in evidence and marked

"PLAINTIFFS' EXHIBIT No. 2"

ordinance No. 537, N. S., said ordinance being in the words and figures following to wit:

Ordinance No. 537 N. S.

An Ordinance Establishing Official Curb Grades and Positions of Curbs on Broadway from Keith Avenue Northerly

Be it ordained by the council of the City of Oakland, as follows:

Section 1. The official curb grades and positions of curbs on Broadway between a line passing through the northern return northwestern corner of Broadway and Keith avenue, said line being at right angles to the eastern line of Broadway, and a point distant 695 feet northerly from said right angle line, are hereby fixed and established as shown upon that certain map entitled "Map showing official grades and positions of curbs on Broadway between Keith avenue and a point 695 feet northerly from the north return northwest corner of Keith avenue and Broadway, Oakland, Cal., Sept. 27, 1913, Perry F. Brown, superintendent of streets and ex-offiio city engineer", filed in the office of the city clerk of said city on the sixth day of October, 1913.

140 Section 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 3. This ordinance shall take effect immediately.

In council, Oakland, Cal., October 14th, 1913.

Passed by the following vote:

Ayes—Commissioners Baccus, Turner and Vice President Forrest, 3. Noes—None. Absent—Commissioners Anderson and President Mott, 2.

Attest:

FRANK K. MOTT,
Mayor of the City of Oakland.

Attest:

FRANK M. SMITH,
City Clerk and Clerk of the Council of the City of Oakland, Cal.

[Inserted in original transcript on file with the clerk of the Supreme Court.]

(Here follows map marked page 140½.)

MAP SHOWING

OFFICIAL GRADES AND POSITIONS OF CURBS

ON

BROADWAY

BETWEEN

KEITH AVENUE AND TEMESCAL CREEK

AND ON

PATTON STREET

BETWEEN

BROADWAY AND FIFTY-NINTH STREET

Oakland, Cal
November 19, 1914

Perry F. Brown
Superintendent of Streets and
Ex-officio City Engineer

EXPLANATION:-

Curb lines are shown hereon by light lines and property lines by heavy lines.

Figures written hereon thus [illegible] denote grade elevations in feet and decimal fractions thereof above "OAKLAND CITY BASE" for the top of the curb at the points indicated by the respective crosses. Where the letter R is written immediately after the figures showing the elevation, the indicated point is hereby declared to be the return.

The word return as used hereon means the point of tangency of the straight curb with the curved curb. At the corners said curved curb is circular and tangent to the straight curbs of the intersecting streets and has a radius equal to the width of the narrower of the intersecting sidewalks, except where the radius is specifically indicated otherwise. By the word sidewalk as used hereon is meant the entire space between the property line and the curb line [illegible] hereto.

Elevations shown hereon are for curbs of GRANITE, CEMENT or CONCRETE. Wooden curbs are to be two (2) inches lower.

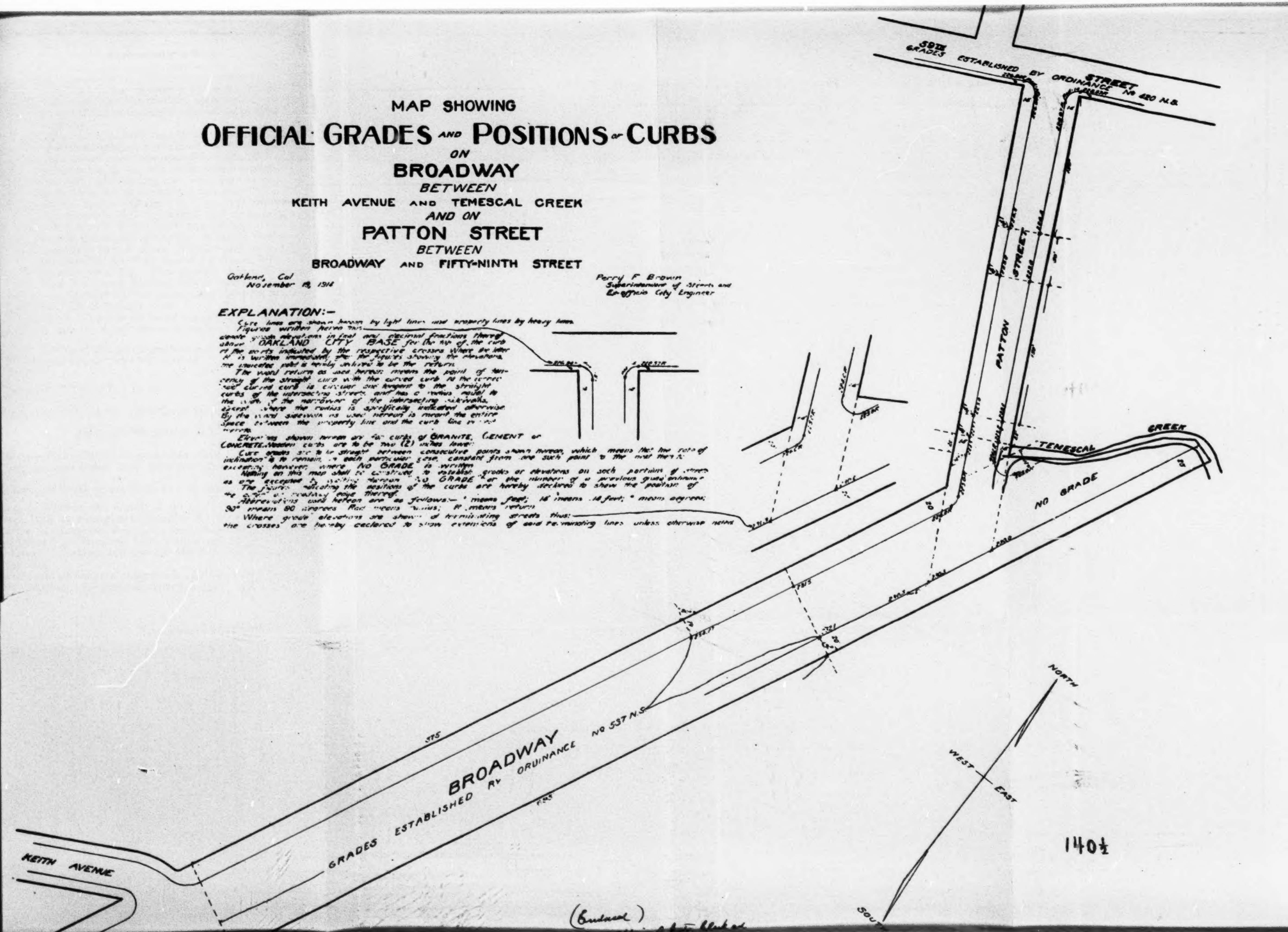
Curb grades are to be straight between consecutive points shown hereon, which means that the rate of inclination is to remain, in each particular case, constant from one such point to the next thereto, excepting, however, where NO GRADE is written.

Nothing on this map shall be construed to establish grades or elevations on such portions of streets as are excepted by writing thereon "NO GRADE" or the number of a previous grade ordinance.

The figures indicating the positions of the curbs are hereby declared to show the position of the outer or roadway edge thereof.

Abbreviations used hereon are as follows:- ' means feet; 16' means 16 feet; ° means degrees; 90° means 90 degrees. Rad means radius; R means return.

Where grade elevations are shown at terminating streets thus: the crosses are hereby declared to show extensions of said terminating lines unless otherwise noted.



140½

(Enclosed)

MAP SHOWING

OFFICIAL GRADES AND POSITIONS OF CURBS

ON

BROADWAY

BETWEEN

KEITH AVENUE AND TEMESCAL CREEK

AND ON

PATTON STREET

BETWEEN

BROADWAY AND FIFTY-NINTH STREET

Oakland, Cal
November 18, 1914

Perry F. Brown
Superintendent of Streets and
Ex-officio City Engineer

EXPLANATION:—

Curb lines are shown hereon by light lines and property lines by heavy lines.

Figures written hereon thus _____ denote grade elevations in feet and decimal fractions thereof above "OAKLAND CITY BASE" for the top of the curb at the points indicated by the respective crosses where the letter "A" is written immediately after the figures showing the elevations, the inscribed point is hereby declared to be the return.

The word return as used herein means the point of tangency of the straight curb with the curved curb at the corner and curved curb is circular arc tangent to the straight curbs of the intersecting streets and has a radius equal to the width of the narrower of the intersecting sidewalks, except where the radius is specifically indicated otherwise. By the word sidewalk as used herein is meant the entire space between the property line and the curb line in each instance.

Elevations shown hereon are for curbs of GRANITE, CEMENT or CONCRETE. Wooden curbs are to be two (2) inches lower.

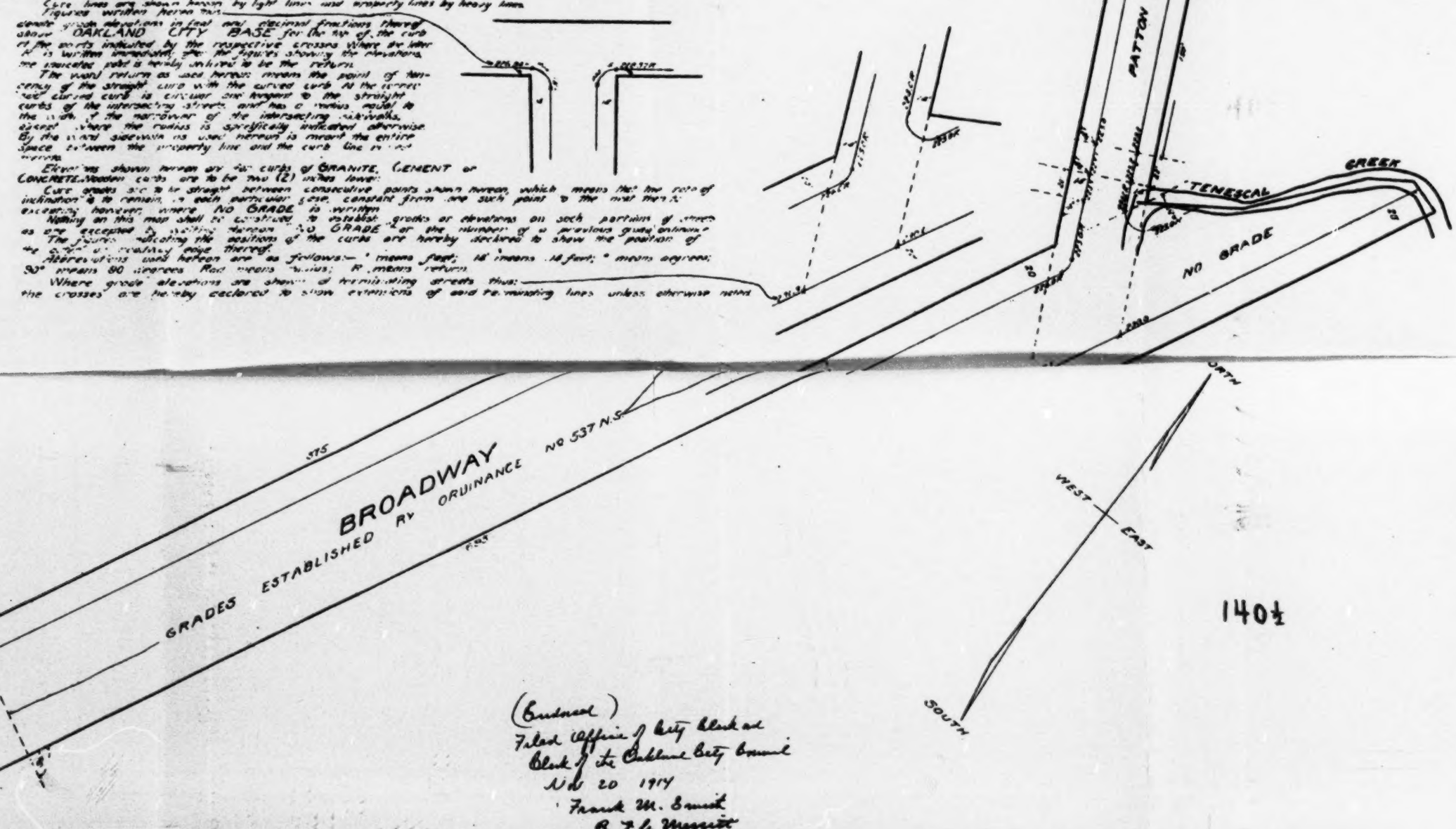
Curb grades are to be straight between consecutive points shown hereon, which means that the rate of inclination is to remain in each particular case, constant from one such point to the next thereof, excepting, however, where NO GRADE is written.

Nothing on this map shall be construed to establish grades or elevations on such portions of streets as are excepted by stating thereon "NO GRADE" or the number of a previous grade ordinance.

The figures indicating the positions of the curbs are hereby declared to show the position of the "top" or roadway edge thereof.

Abbreviations used hereon are as follows:— ' means feet; " means inches; ° means degrees; 90° means 90 degrees. Rad means radius; R. means return.

Where grade elevations are shown at terminating streets thus: _____ the crosses are hereby declared to show extensions of said terminating lines unless otherwise noted.



(Endorsed)
Filed (Office of City Clerk as)
Clerk of the Oakland City Council
Nov 20 1914
Frank M. Brunt
By F. C. Merritt
Deputy

1401

Mr. Wright: I now offer ordinance No. 573 N. S. entitled ordinance changing and reestablishing curbs of Broadway, between Ocean View drive, and Keith avenue.

141 Mr. Soto: Our objection to this ordinance is that it is irrelevant and immaterial for any purpose and that it does not tend to prove any issue in the case, that it is not admissible without the offering in evidence—if they propose to follow this up by offering in evidence the antecedent proceedings upon which this ordinance was based; that if this ordinance is intended to be offered for the purpose of showing——

Mr. Wright: We can save some time there by saying that the order in which the memorandum was offered was wrong and that the other ordinance should have been offered first, it is 3091 and to save time, I will follow this up by 3091 which fixes the grade.

Mr. Soto: With that understanding they will offer the other one, we still insist on the objection on the ground that even if there had been a change effected by this ordinance, that cannot be adjudicated in this case. The theory is, as I understand, that more work was done or less work was done if this grade was followed; that they should have followed the original grade this ordinance purports to follow. It is immaterial because if the ordinance did not establish the proper grade therefor, the work should have been done with reference to the other ordinance. That question cannot be determined here. That is a matter that can only be determined on appeal to the city council; the claim being the work was not

142 done to the official line and grade.

The Court: There is no use of arguing now. That is a matter that will come up on submission of the case, I presume.

The court then overruled said objections and received said ordinance in evidence, and the same was marked

"PLAINTIFFS' EXHIBIT No. 3."

Said ordinance is in the words and figures following viz:

Ordinance No. 573, N. S.

An Ordinance Changing and Re-establishing Curb Grades on Broadway Between Ocean View Drive and Keith Avenue.

Be it ordained by the council of the City of Oakland, as follows:

Section 1. Whereas, the council of the City of Oakland did on October 6, 1913, by resolution of intention No. 6634 N. S., declare its intention to change and re-establish the curb grades on Broadway between Ocean View drive and Keith avenue, and directed the clerk of the council to publish and post for two days said resolution of intention, and

Whereas, said resolution of intention was published and posted for two days, describing the proposed change of grade, and

143 Whereas, the superintendent of streets caused notices of the passage of said resolution of intention to be posted along the street designated in said resolution of intention where the change of grade is proposed to be made, and

Whereas, no protests were filed against the proposed change of grade, now, therefore, it is hereby ordered that the curb grades on Broadway between Ocean View drive and Keith avenue are hereby changed to the following elevations above Oakland City base, to wit:

245.5 feet eastern curb and 246.5 feet western curb on a line at right angles to the eastern line of Broadway at its intersection with the northwestern line of Ocean View drive;

247.1 feet eastern curb and 247.6 feet western curb at points distant 20 feet northerly of said right angle line;

248.2 feet eastern curb and 248.5 feet western curb at points distant 40 feet northerly of said right angle line;

249.2 feet both curbs at points distant 65 feet northerly of said right angle line;

253.7 feet both curbs at points distant 60 feet southerly of a line passing through the southern return southwestern corner of Broadway and Keith avenue, said line being at right angles to the eastern line of Broadway;

144 254.2 feet both curbs at points distant 35 feet southerly of said last mentioned right angle line;

254.4 feet both curbs at points distant 10 feet southerly of said last mentioned right angle line;

254.3 feet both curbs at said last mentioned right angle line;

254.1 feet eastern curb at a point distant 15 feet northerly of said last mentioned right angle line;

253.75 feet eastern curb at a point distant 40 feet northerly of said last mentioned right angle line;

253 feet eastern curb at a point distant 65 feet northerly of said last mentioned right angle line;

252.3 feet both curbs on a line passing through the northern return northwestern corner of Broadway and Keith avenue, said line being at right angles to the eastern line of Broadway;

253 feet western return northwestern corner and 255 feet western return southwestern corner of Broadway and Keith avenue.

Curbs shall be straight between consecutive elevations on the respective curb lines.

Grades for wooden curbs shall be two (2) inches lower than the aforementioned elevations, which are for curbs of granite, cement or concrete.

145 Section 2. Any part of an ordinance in conflict herewith is hereby repealed.

Section 3. This ordinance shall take effect immediately.

In council, Oakland, Cal., November 28th, 1913.
Passed by the following vote:
Ayes—Commissioners Anderson, Forrest, Turner and President
lott—4. Noes—None. Absent—Commissioner Baccus—1.

Attest:

FRANK K. MOTT,
Mayor of the City of Oakland.

Attest:

FRANK M. SMITH,
City Clerk and Clerk of the Council of the City of Oakland, Calif.

Plaintiffs offered and there was received in evidence and marked

"PLAINTIFFS' EXHIBIT No. 4"

rdinance No. 3091, said ordinance being in the words and figures
llowing, to wit:

Ordinance No. 3091.

n ordinance establishing official grades and positions of curbs on Broadway from Taft avenue to Keith avenue, on Lawton or Third avenue from McMillan street to Broadway, and on the curved portion of Keith avenue at the easterly end of said Keith avenue.

16 Be it ordained by the council of the City of Oakland, as follows:

Section 1. The official curb grades on Broadway from Taft avenue Kieth avenue, on Lawton or Third avenue from McMillan street Broadway, and on the curved portion of Kieth avenue at the eastly end of said Keith avenue, are hereby fixed and established at e elevations above Oakland City base shown on that certain map titled, "Map showing official elevations and positions of curbs on roadway from Taft avenue to Kieth avenue, on Lawton or Third venue from McMillan street to Broadway and on the eastern end Kieth avenue, Oakland, Cal., May 16, 1910, F. C. Turner, city gineer," filed in the office of city clerk and clerk of the Oakland ty council on May 26th, 1910.

Section 2. The official position of the curbs on the aforesaid streets d avenues shall be as shown on the aforesaid map.

Section 3. All parts of ordinances in conflict herewith are hereby pealed.

Section 4. This ordinance shall take effect and be in force from d after its passage and approval.

In council Oakland, Cal., June 20th, 1910.
Passed by the following vote:

Ayes—Messrs. Baccus, Bronner, Cobbledick, Elliott, Everhart, Ellsworth, MacGregor, Stackler, Stiefvater, Vose and President Pendleton.

147

B. H. PENDLETON,
President of the Council of the City of Oakland.

Approved: June 28, 1910.
FRANK K. MOTT,
Mayor of the City of Oakland.

[Inserted in original transcript on file with the clerk of the Supreme Court.]

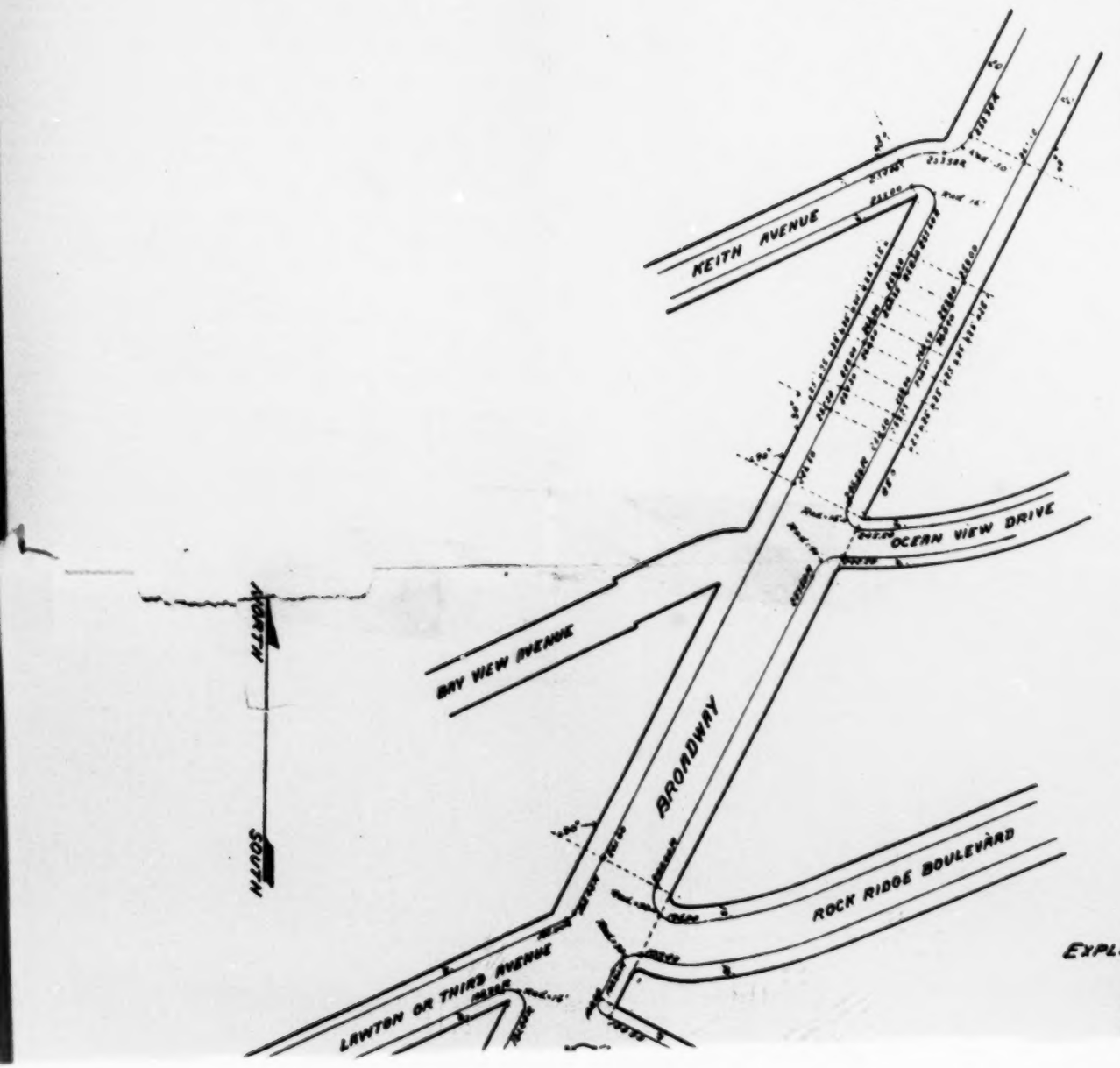
(Here follows map marked page 147½.)

MAP SHOWING
OFFICIAL ELEVATIONS & POSITIONS OF CURBS

ON BROADWAY FROM TAFT AVENUE TO KEITH AVENUE, ON LAWTON OR THIRD AVENUE FROM McMILLAN STREET TO BROADWAY AND ON THE EASTERN END OF KEITH AVENUE.

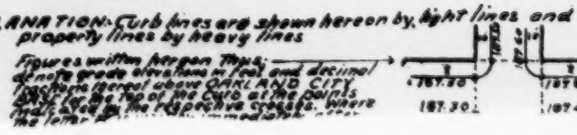
OAKLAND, CAL.
MAY 16 - 1910

F.C. TURNER
CITY ENGINEER.



EXPLANATION: Curb lines are shown hereon by light lines and property lines by heavy lines.

Figures written thereon thus; denote grade elevations in feet and decimals thereof above OAKLAND CITY DATUM, at the top of the curb at the points where the lines of the respective streets, where they [illegible]



Witness (continuing): I have the plans and specifications referred to in the resolution of intention.

Said plans and specifications were thereupon offered and received in evidence.

Plaintiffs offered and there was received in evidence and marked

"PLAINTIFFS' EXHIBIT NO. 5"

said plans and specifications, the same being in the words and figures following, to wit:

Specifications for the Improvement of Broadway Between Patton Street and Ocean View Drive, Patton Street Between Fifty-ninth Street and Broadway, and a Portion of a Right of Way Granted by H. S. Patton to the City of Oakland, All in the City of Oakland, County of Alameda, State of California.

148 General Provisions.

The work to be done under these specifications consists in grading, and the construction of a culvert with curtain and wing walls, manholes, inlet and conduits.

The plans attached hereto are to be considered with, and are hereby made a part of these specifications, and shall be conformed to.

The work shall be done under the direction, supervision and to the satisfaction of the superintendent of streets of the City of Oakland, and shall conform to the lines and grades as given by the city engineer of said city.

All materials used in the work shall comply with these specifications and be to the satisfaction of the superintendent of streets. Samples of said materials, and information in regard thereto, must be furnished to said superintendent of streets, if required by him, and representatives of the superintendent of streets shall be given facilities for the inspection of materials and processes used in connection with the work.

All rejected and refuse materials shall be removed immediately from the work, and all surplus materials shall be removed from the street within five [5] days after the construction of the street is complete.

149 The contractor shall provide and maintain such fences, barriers, "Street Closed" signs, red lights, and watchmen as may be necessary to prevent avoidable accidents to the public.

No material, or other obstruction, shall be placed within five [5] feet of fire hydrants, which must be at all times readily accessible to the fire department.

Any overseer, superintendent, laborer or other person employed on the work by the contractor, who shall perform his work in a manner contrary to these specifications, or who is disorderly, intemperate or incompetent, shall be discharged immediately, and such person shall not again be employed on this work.

In case it should be necessary to move the property of any owner of a public utility or franchise, such owner will, upon proper application by the contractor, be notified by the superintendent of streets to move such property within a specified reasonable time, and the contractor shall not interfere with such property until after the expiration of the time specified.

The right is reserved to the owners of public utilities or franchises to enter upon the streets for the purpose of making repairs or changes of their properties that may be made necessary by the work.

150 The City of Oakland shall also have the right of entering upon the street for the purpose of repairing sewers, or making connections therewith, or repairing culverts, catch-basins or storm-water drains.

The contractor shall be constantly on the work during its progress, or shall be represented by a foreman who is competent to receive and carry out any instructions that may be given him by the proper authorities, and said contractor will be held liable for the faithful observance of any instructions which may be delivered to him or his representatives on the work.

Concrete Culvert.

The prices bid per lineal foot of concrete culvert are to be considered as including the cost of excavation, filling the trench, and the construction of the wing and curtain walls.

The excavation shall be large enough to allow of properly placing the forms and concrete and for inspection of the work. The bottom of the trench shall be kept dry during the progress of the work. Sewers, water and gas pipes must be properly supported where crossing the culvert. Whenever the bottom of the trench is in mud or quicksand the bottom must be made solid by replacing the mud or quicksand with earth well tamped in place.

151 The entire inside surface of said concrete culvert and all other exposed surfaces shall be smooth and uniform when finished, and in depositing the concrete against the forms, care shall be taken to work the fine portions of the concrete to the surface so as to leave the surface of the finished concrete in the condition above specified. Concrete shall be what is known as a "wet concrete" and shall be tamped or worked with a flat spade or similar tool sufficiently to produce a dense mass, free from voids. All holes, pockets or other irregularities in the surface of the concrete shall be entirely filled and smoothed up with cement mortar composed of one (1) part cement to two (2) parts sand.

Before joining new work to concrete that has been in place more than three (3) hours, the surface of the latter must be roughened, swept clean, and washed over with a fluid grout of neat Portland cement. Inside forms shall be covered with water-proof building paper to prevent leakage of mortar.

Inside arch forms shall remain undisturbed for at least six (6) days after placing the concrete. Concrete in place shall be kept wet for ten (10) days by watering at least twice each day, or by spread-

ing thereon a layer of earth, which shall be kept wet for ten (10) days.

Concrete shall be a mixture of the sand, cement and stone hereinafter specified, mixed in the proportion of ninety-four (94)
152 pounds of cement, two and one-half (2½) cubic feet of sand and five (5) cubic feet of stone. The mixing may be either by hand or by machine of the "Batch" type, but in either case must result in a thorough and uniform admixture of the several ingredients. If any question arises as to the accuracy of the proportions, measuring boxes must be provided by the contractor and accurate tests made therewith. During the mixing, water is to be added by spraying (not played on in a stream) till the concrete is so wet that it may be tamped with a spade, but not so wet that the water and stone will freely separate in handling. In hand-mixing, the mixing shall be done on tight planking and the material shall be accurately measured in a frame placed on the mixing board.

Concrete shall be placed on the work as soon as practicable and no concrete that has been wet more than one (1) hour shall be used. Concrete is to be deposited in layers not exceeding six (6) inches in thickness, each layer to be thoroughly tamped, care must be taken not to disturb the alignment of forms.

Cement.

All cement used on the work shall be Portland cement. It shall be delivered in the manufacturer's packages with the brand and name of the manufacturer plainly marked thereon. Each
153 lot of cement shall be submitted for inspection and test at least fourteen (14) days before it is used upon the work. Cement coming from different cement bins or shipped in different cars will be considered as different lots of cement; and the contractor shall inform the inspector of the number of the car and the date of shipment from the cement works of each lot. The contractor shall furnish proper facilities for the preservation of the identity and the integrity of each lot of cement from the time it is sampled until it is either accepted or rejected. All rejected lots of cement shall be at once removed from the work. Any lot of cement which shall have become damaged after it has been sampled or accepted shall not be used upon the work until it has been resampled and subsequently accepted.

The acceptance or rejection of the cement shall be based on the following requirements:

The specific gravity of the cement, after ignition at a low red heat, shall be not less than 3.10; nor shall the cement lose more than four (4) per cent of its weight during such ignition.

The cement shall leave, by weight, a residue of not more than eight (8) per cent on the No. 100, nor more than twenty-five (25) per cent on the No. 200 Standard sieve.

154 The cement should take not less than one hour to set so that a round wire, one-twelfth (1-12) inch in diameter and

loaded to a total weight of one-fourth (¼) pound, will not produce a greater indentation than one one-hundredth (1-100)) of an inch when applied vertically to the surface of a pat made of neat cement of normal consistency. The cement shall take not less than two hours to set so that a round wire, one-twenty-fourth (1-24) inch in diameter and loaded to a total weight of one pound, will not produce a greater indentation than one one-hundredth (1-100) of an inch when applied vertically to the surface of a pat made of neat cement of normal consistency.

The cement shall show no retrogression in strength within the periods specified below; and the minimum tensile strength which briquettes, one inch square in cross-section, shall develop will be as follows:

Briquettes of Neat Cement.

Age.	Strength.
7 days (1 day in moist air, 6 days in water)	500 lbs.
28 days (1 " " " " 27 " " "	600 lbs.

Briquettes of 1 *Part Cement and* 3 *Parts Standard Sand.*

Age.	Strength.
7 days (1 day in moist air, 6 days in water)	200 lbs.
28 days (1 " " " " 27 " " "	275 lbs.

Cement failing to pass the above-described seven day tests may be held awaiting the results of the above-described twenty-eight day test.

The Standard sand used in making the sand briquettes will
155 be a natural pure quartz sand from Ottawa, Ill., and will consist of well-rounded rough-surfaced grains not more than three (3) per cent of which will pass a No. 30 sieve or be retained on a No. 20 sieve.

Pats of neat cement about three and one-half (3½) inches in diameter, one-half (½) inch thick at the center and tapering to a thin edge, will be kept in moist air for twenty-four (24) hours; and then one pat will be kept in air at normal temperature; another pat will be kept in water at a temperature of 65° to 75° Fahrenheit; a third pat will be exposed for five (5) hours to an atmosphere of saturated steam at a temperature of from 210° to 215° Fahrenheit. To satisfactorily pass the requirements these pats shall remain firm and hard and show no signs of distortion, checking, cracking or disintegration.

The cement shall not contain more than 1.75 per cent of sulphuric trioxide nor more than four (4) per cent of magnesia (MgO).

Sand for Concrete.

Sand shall be clean, sharp, dry, silicious sand, and shall not contain, in all, more than five (5) per cent by volume of clay, loam, mica, silt or other objectionable inorganic matter, nor more than

one (1) per cent of organic matter. It shall be made up of
156 grains whose composition shall be such that at least sixty (60) per cent, by weight, shall pass a twenty (20) mesh screen, not more than eighty-five (85) per cent shall pass a fifty (50) mesh screen, and not more than fifteen (15) per cent shall pass an eighty (80 mesh screen.

Stone for Concrete.

The stone for all concrete shall be hard, sound, clean rock, free from clay, or other earthy material. Said stone shall be of such sizes that the largest piece will pass by the longest dimensions through a circular ring two (2) inches in diameter, and to be so graded in size as to make a compact concrete and the smallest piece shall be rejected by the ring one-fourth (¼) inch in diameter.

Storm Water Inlet and Manholes.

Storm water inlet and manholes shall be constructed of hard-burned, clear-ringing bricks, according to and at point shown on the plans.

All brick shall be thoroughly sprinkled with water immediately before laying and shall be laid in cement mortar, composed of one part hydraulic Portland cement to two parts sand.

The interior of said structure shall be plastered with cement mortar, one-half inch thick, composed of one part hydraulic
157 Portland cement to two parts sand. The surface of the walls shall be brushed clean and smooth after applying said plaster.

Tops of said structures are to be of cast-iron, and of forms and dimensions shown on plans. Castings are to be set on masonry work, in mortar composed of one (1) part hydraulic Portland cement to two (2) parts of sand. All iron castings shall be of good quality of gray iron, tough and even grain, free from blow or sand holes or other defects.

The castings shall be thoroughly cleaned, and then coated with coal-tar pitch heated to two hundred (200) degrees Fahr.

Conduits.

The conduits are herein designated by their interior diameter, and shall be of the best quality, standard salt-glazed, vitrified, iron-stone sewer pipe, with socket, free from warps, cracks or blow holes.

The pipe shall be straight and not vary from a true cylinder more than one-twelfth (1-12) of an inch for each three inches of diameter of pipe.

Each pipe must lie on the grade of trench and the spigot-end be embedded in the cement mortar in the socket of the pipe previously laid; said cement mortar shall extend around the inside of said socket on its lower half.

The pipe shall be laid with its spigot end not more than
158 one-quarter (¼) inch from the shoulder of the socket of the previously laid pipe. After the pipe is properly on grade

and line, the socket shall be filled all around with cement mortar, pressed in with the hand or trowel, filling mortar flush with outside of socket and one inch on body of entering pipe.

The sockets must be laid in the cross-cuts previously cut in the trench.

Fine earth shall be pressed under, and half way up the sides of the pipe, and tamped before the next pipe is laid.

The interior of the conduit shall be carefully freed from all cement, dirt and superfluous material of every description as the work proceeds.

Should there be any space on the inside between the ends of the pipe, it must be solidly filled with cement mortar and smoothed to the surface.

Cement mortar for cementing pipes, shall be composed of one (1) part hydraulic Portland cement to two (2) parts sand.

The grade of the trench shall be uniform throughout its entire length.

Where the trench is in rock, excavation shall be six (6) inches below grade and the bottom brought to grade with earth, well tamped in place.

Wherever the bottom of the trench is in mud or quick-
159 sand, the bottom must be made solid by re-placing the mud or quick-sand with dry earth well tamped in place.

After the pipe has been properly laid the space between it and the sides of the trench shall be filled with fine earth, both sides being filled at the same time and carefully tamped so as not to disturb the pipe. No filling shall be done, however, until the work has been inspected and approved by the official whose duty it is to inspect and approve the same.

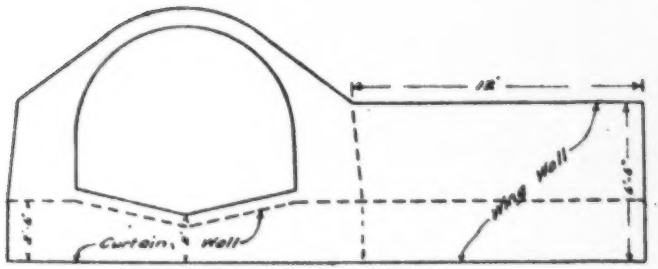
After the pipe has been laid and tamped as before described, the trench shall be filled in layers of earth, free from stone, each layer to be nine (9) inches thick and solidly tamped before another layer is added. This mode of filling shall be adopted for the entire depth of trench.

Sand.

Sand for mortar, shall be clean, sharp, dry, silicious sand, shall not contain, in all, more than five (5) per cent by volume, of clay, loam, mica, scales, silt or other objectionable inorganic matter, nor more than one (1) per cent of organic matter. It shall be made up of grains whose compositions shall be such that at least sixty (60) per cent by weight, shall pass a twenty (20) mesh screen, not more than eighty-five (85) per cent shall pass a fifty (50) mesh screen, and not more than fifteen (15) per cent shall pass an eighty (80) mesh screen.

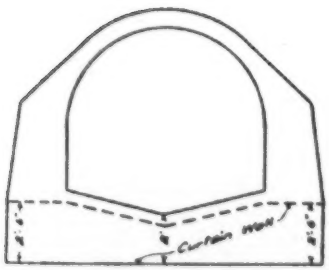
160 ## Grading.

Grading under these specifications shall consist in bringing the street, by excavating or filling, to the elevations designated by stakes set by the city engineer and to the cross-sections shown upon the plans.

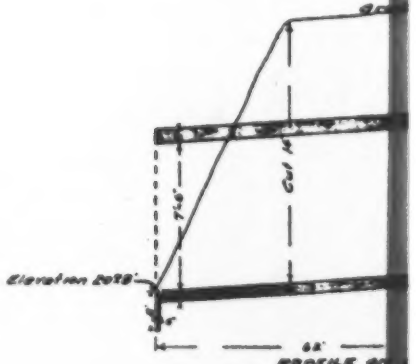


VIEW OF NORTHEASTERN END
Showing Wing Wall and Curtain Wall

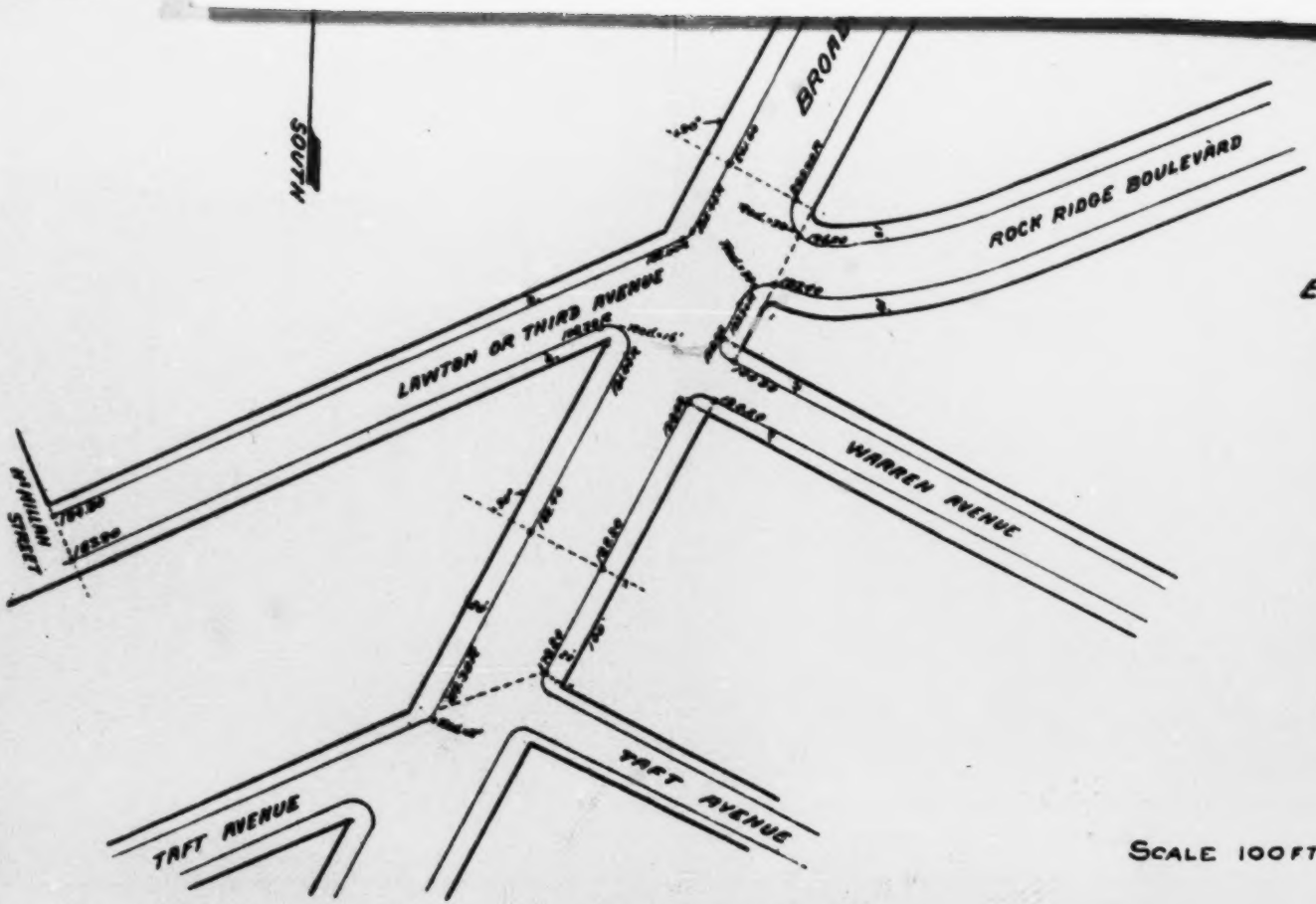
Cross-S
of Wing



VIEW OF SOUTHWESTERN END
Showing Curtain Wall.

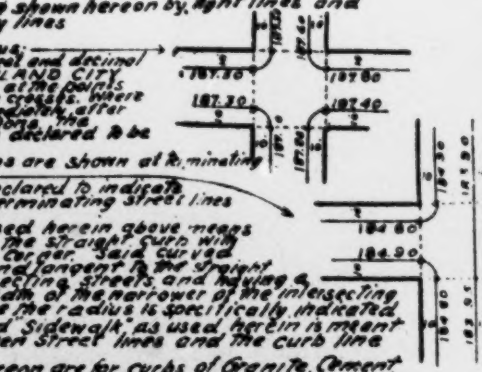


PROFILE



EXPLANATION: Curb lines are shown hereon by light lines and property lines by heavy lines

Figures written hereon thus, ——→ denote grade elevations in feet and decimal fractions thereof above OAKLAND CITY DATUM for the top of the curb at the points indicated by the respective crosses. Where the letter C is written immediately after figures showing the elevations, the indicated point is hereby declared to be the return.



Where grade elevations are shown at terminating streets thus ——→ the crosses are hereby declared to indicate extensions of said terminating street lines unless otherwise shown.

The word Return as used herein above means the point of tangency of the straight curb with the curved curb at the corner. Said curved curb being circular and tangent to the straight curbs of the two intersecting streets and having a radius equal to the width of the narrower of the intersecting sidewalks except where the radius is specifically indicated otherwise. By the word Sidewalk as used herein is meant the entire space between street lines and the curb line nearest thereto.

Elevations shown hereon are for curbs of Granite, Cement or Concrete. Wooden Curbs shall be two (2) inches lower.

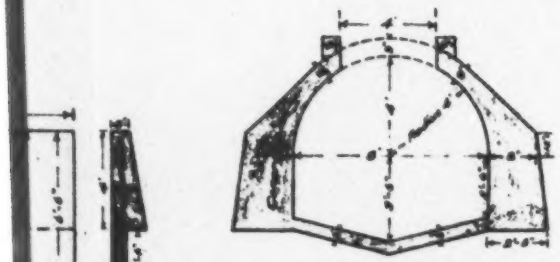
Curb grades are to be straight between consecutive points shown hereon, which means that the rate of inclination is to remain in each particular case constant from one such point to the next thereto, excepting however where "NO GRADE" is written thereon.

The figures placed between the street line and the curb line are hereby declared to show the position of the outer or roadway edge of the curb.

Abbreviations are used hereon as follows:- ' feet, 10 means 10 feet. ° degrees. thus 90° = 90 degrees. Rad. Radius. R. Return.

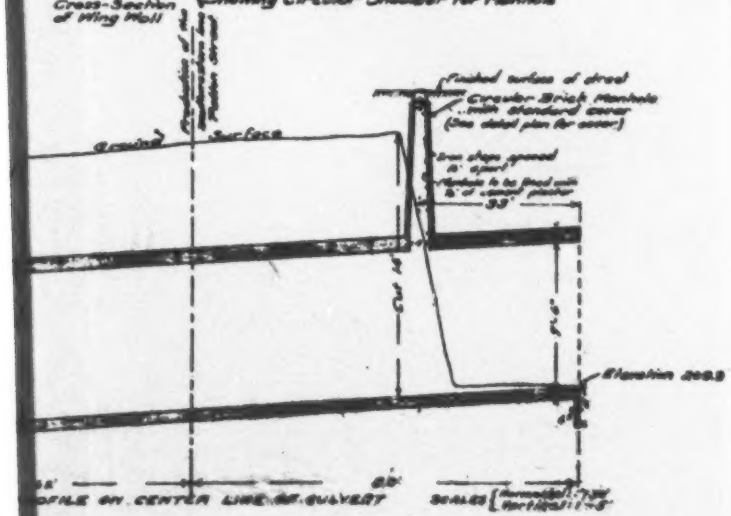
SCALE 100 FT = 1 IN.

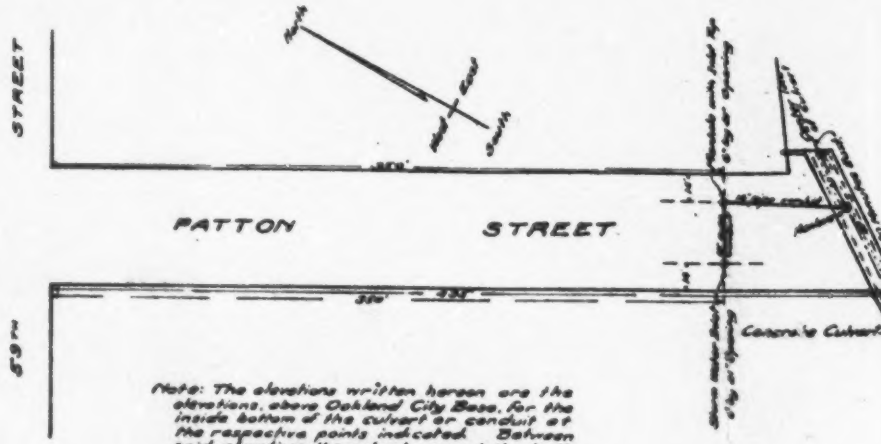
147 1/2



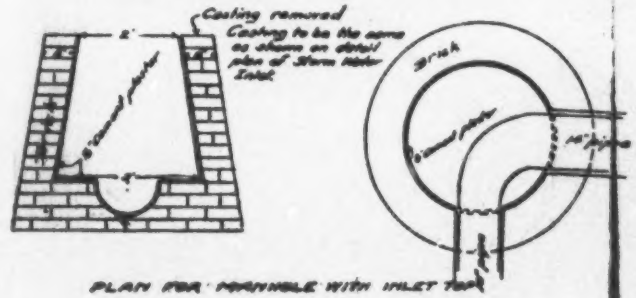
CROSS SECTION
Showing Circular Shoulder for Manhole

Cross-Section of Wing Wall



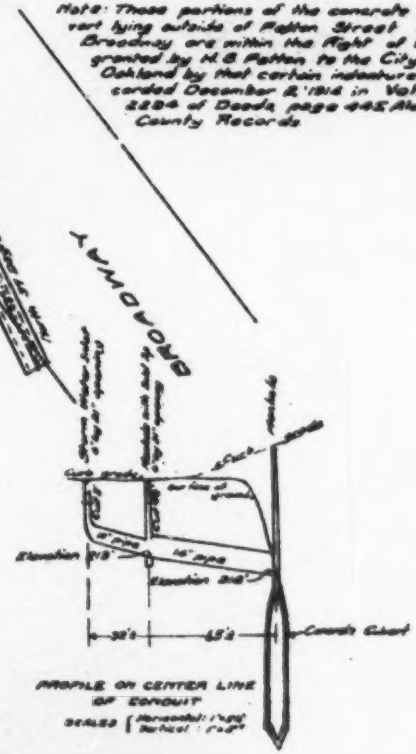


Note: The elevations written hereon are the elevations, above Oakland City Base, for the inside bottom of the culvert or conduit at the respective points indicated. Between said elevations the culvert or conduit shall have a straight grade.

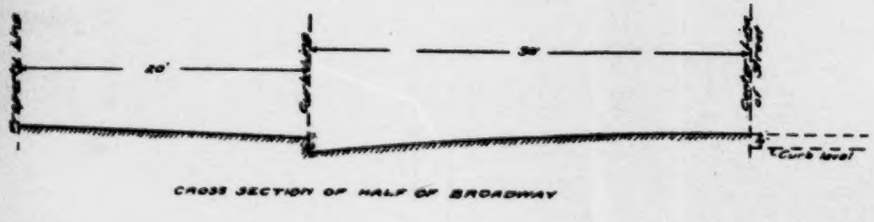


Note: These portions of the concrete culvert lying outside of Patton Street and Broadway are within the right of way granted by H.B. Patton to the City of Oakland by that certain indenture recorded December 2, 1914 in Volume 2284 of Deeds, page 445, Alameda County Records.

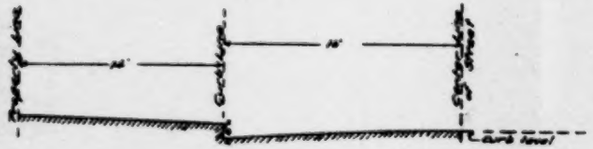
532-28



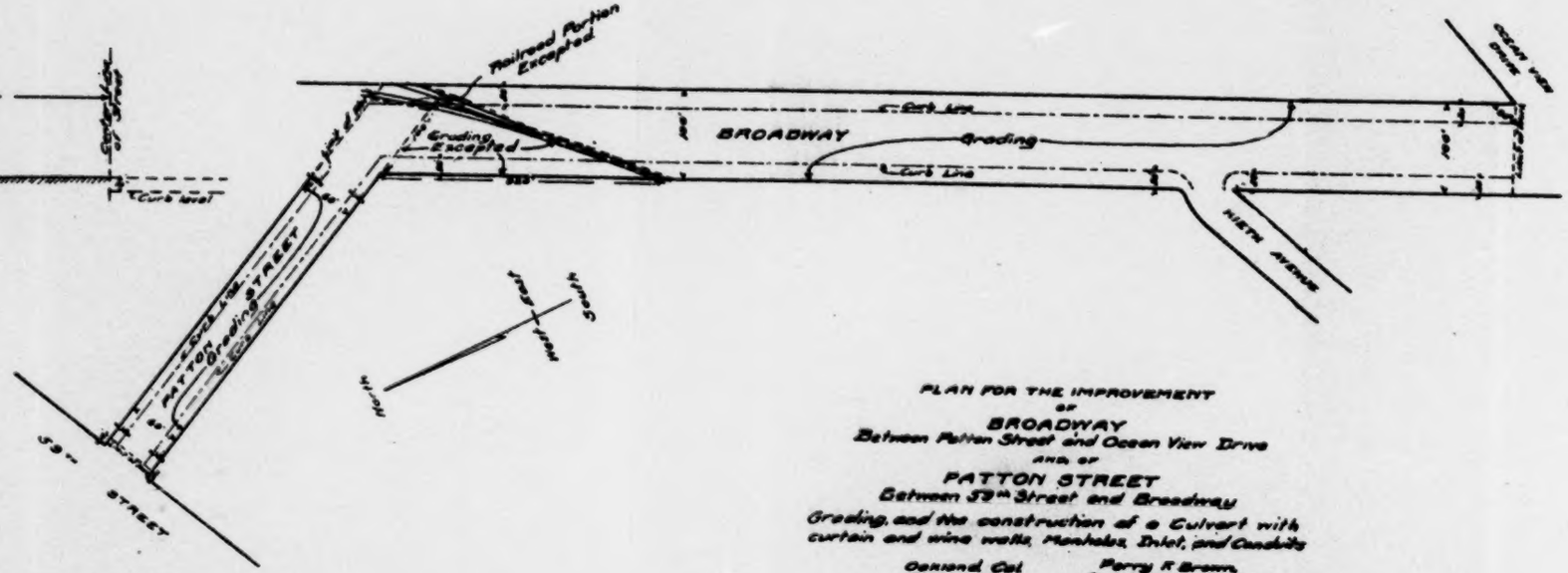
161a



CROSS SECTION OF HALF OF BROADWAY



CROSS SECTION OF HALF OF PATTON STREET



PLAN FOR THE IMPROVEMENT
OF
BROADWAY
Between Patton Street and Ocean View Drive
AND OF
PATTON STREET
Between 53rd Street and Broadway
Grading, and the construction of a Culvert with curtain and wing walls, Manholes, Inlet, and Conduits

Ordered Cal
Dec. 11, 1918.

Percy R. Brown,
Superintendent of Streets
and ex-officio City Engineer

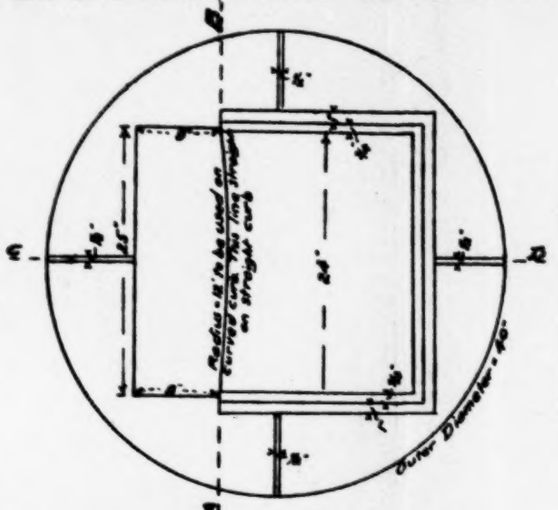
Note: The symbols "'", "" and ° used herein mean "feet", "inches", and "degrees", respectively.

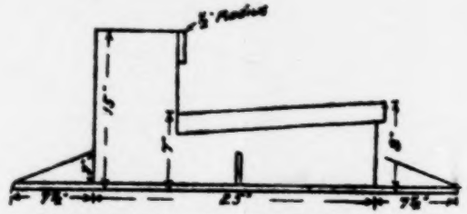
532-23

161B

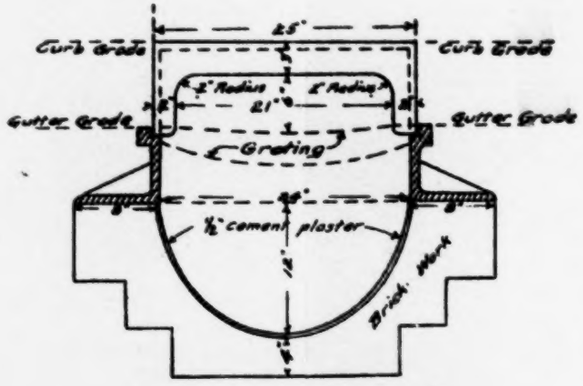
535-68.

PLAN OF CAST IRON TOP OF STORM WATER INLET

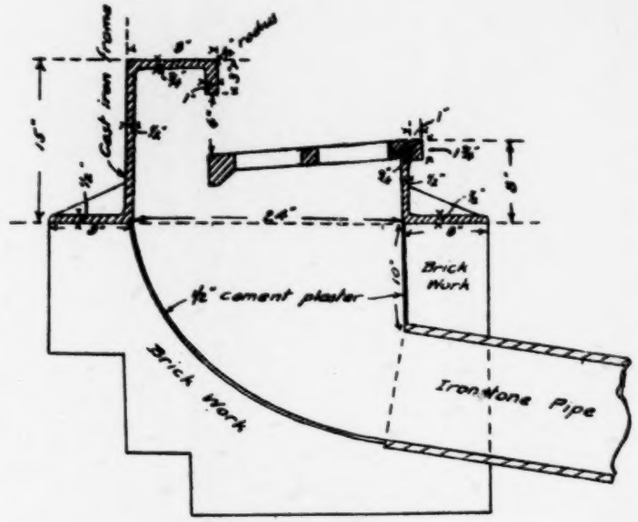




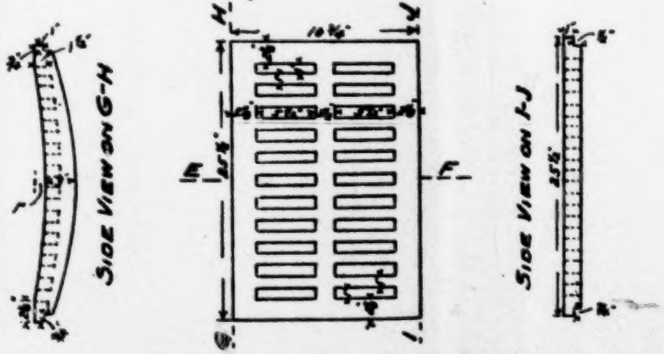
SIDE VIEW OF CAST IRON TOP



SECTION ON A-B



SECTION ON C-D.



DETAILS OF CAST IRON GRATING

SECTION ON E-F

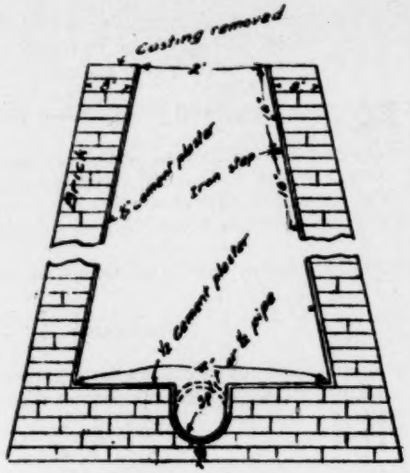
PLAN FOR STORM WATER INLET

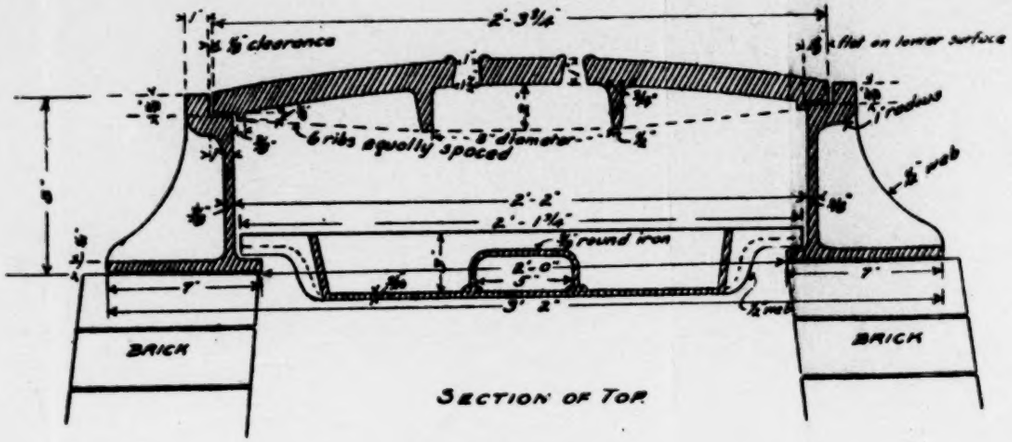
6" BY 21" OPENING

SCALE 1½'

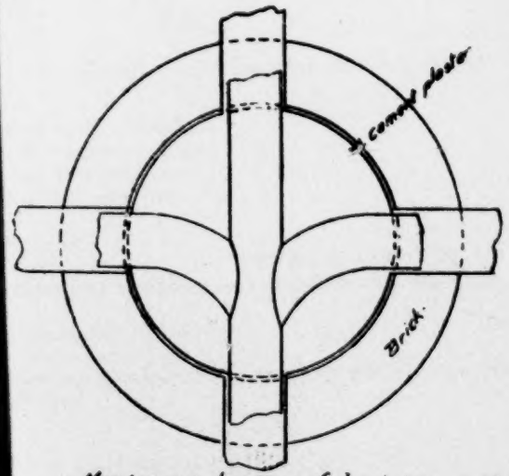
161C

PLAN OF MANHOLE

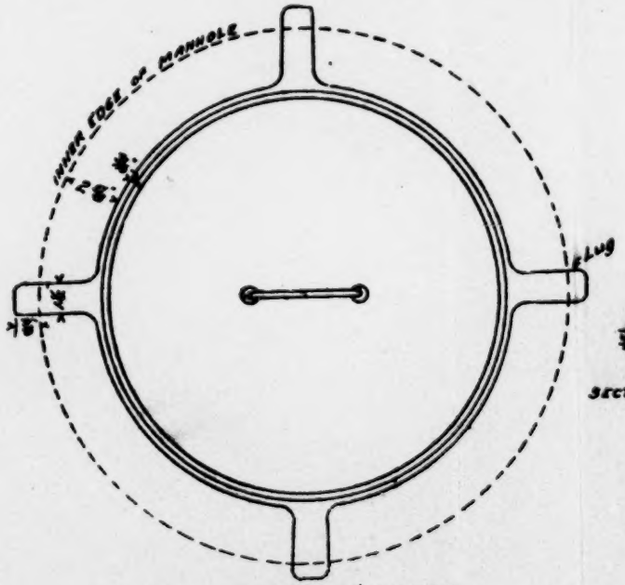




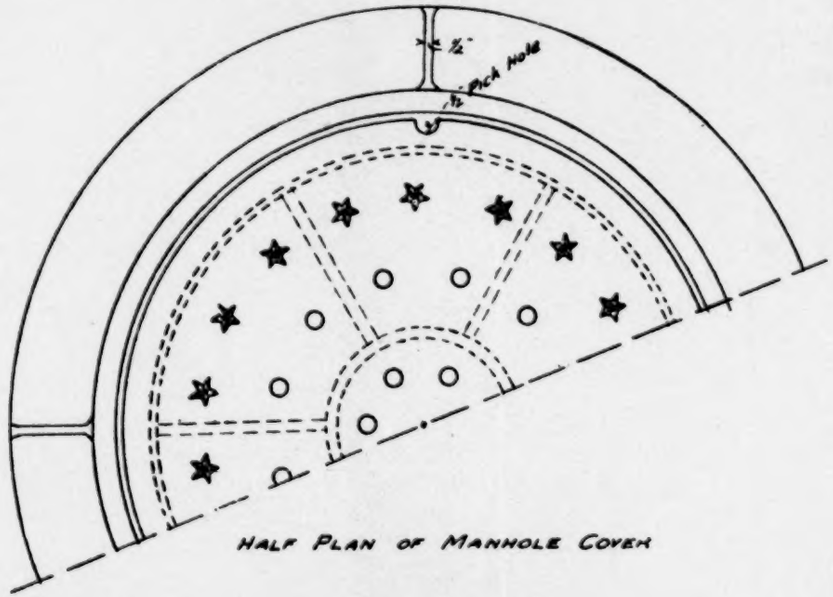
SECTION OF TOP



Number and location of branches as shown on general plan

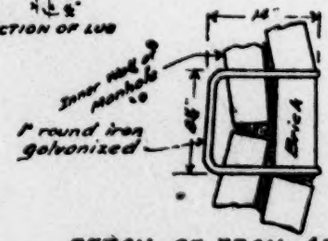


PLAN OF PAN WITH LUGS



HALF PLAN OF MANHOLE COVER

SECTION OF LUG



DETAIL OF IRON STEPS
Spaced 16" apart

161d

Trees not on proper line and grade shall be removed and the roots shall be taken out to a depth of one (1) foot below the original surface of the ground, in fills, and to a depth of one (1) foot below the sub-grade, in cuts.

In filling the street, no perishable or unwholesome material shall be used for such filling.

As part of the grading work, the contractor will be required to reset, in a workmanlike manner, all frames and heads of sewer manholes, catch-basins, sewer vents and inlets and all monuments along the line of the work which are not now at the required grade and line.

No work done outside of the limits of the work called for on the plans will be included.

Estimate.

The following is an estimate of quantities for the purpose of canvassing and determining the bids for the foregoing work:

34,623 cubic yards of earth excavation.
142 linear feet of concrete culvert.
65 linear feet of 14" conduit.
161 32 linear feet of 10" conduit.
1 storm water inlet.
2 manholes.

Bids.

Bidders are to state prices for separate items in place as follows, to-wit:

Per cubic yard of earth excavation.
Per linear foot of concrete culvert.
Per linear foot of 14" conduit.
Per linear foot of 10" conduit.
Per manhole.
Per storm water inlet.

PERRY F. BROWN,
Superintendent of Streets and ex-Officio City Engineer.

Oakland, Cal., December 11, 1914.

[Four plans inserted in original transcript on file with the clerk of the Supreme Court.]

(Here follows four plans, marked pages 161*a*, 161*b*, 161*c*, and 161*d*.)

Plaintiffs offered and there was received in evidence and marked

"PLAINTIFFS' EXHIBIT No. 8,"

the following documents which were attached to each other and bound in one cover, viz:

1. A sufficient certificate made and signed by Perry F. Brown, as superintendendent of streets and ex-officio city engineer of the City of Oakland, County of Alameda, State of California, wherein
162 said city engineer certified that Marsh Bros. and Gardenier, Inc., had constructed and performed certain street work, to wit: the street work described in the answer of defendant Marsh Bros. and Gardenier, Inc., on file herein, and wherein was contained a proper and sufficient statement of the amount of each class *or* work performed in the construction of said street work.

At the foot of said certificate and endorsed thereon was the following, viz: Recorded September 8th, 1915, Perry F. Brown, superintendent of streets and ex-officio city engineer of the City of Oakland.

2. An assessment entitled "Assessment" made and signed by Perry F. Brown as superintendent of streets and ex-officio city engineer of said City of Oakland bearing date September 8th, 1915, wherein and whereby said Perry F. Brown as such superintendent of streets does certify that all of said street work mentioned and described in said answer of Marsh Bros. and Gardenier, Inc., on file herein, has been performed and constructed by said Marsh Bros. and Gardenier, Inc., in accordance with the specifications and to his satisfaction and acceptance, and does assess the total amount of the costs and expenses of the work with the incidental expenses to wit: the total sum of $27,978.68 upon the several pieces, parcels, lots or portions of lots and subdivisions of land in the assessment dis-
163 trict described in the resolution of intention and in the diagram mentioned in said answer, benefited thereby, to-wit: Upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots or subdivisions of land.

And that said assessment briefly refers to the contract mentioned in said answer of said defendant Marsh Bros. and Gardenier, Inc., the work contracted for and performed, and shows the amount to be paid therefor, together with any incidental expenses, the amount of each assessment, the name of the owner of each lot or portion of lot assessed, if known to the said street superintendent, and when the name was unknown to him the word "unknown" is written opposite the number of the lot and the amount assessed thereon, the number of each lot or portion or portions of a lot assessed.

At the foot of said assessment and endorsed thereon is the following, viz: Recorded September 8th, 1915, Perry F. Brown, superintendent of streets and ex-officio city engineer of the City of Oakland.

3. A diagram attached to said assessment made and signed by said Perry F. Brown, as superintendent of streets of said City of Oakland and bearing date September 8th, 1915, and which said diagram exhibits each street and street crossing, lane, alley,
164 place or court on which any work had been done, and shows the relative location of each district, lot or portion of lot to the work done, and numbered to corespond with the numbers in said assessment and shows the number of feet fronting and number of lots assessed for said street work mentioned and described in said answer of Marsh Bros. and Gardenier, Inc., on file herein.

At the foot of said diagram and endorsed thereon is the following, viz: Recorded September 8th, 1915, Perry F. Brown, superintendent of streets, and ex-officio city engineer of the City of Oakland.

4. A warrant made and signed by Perry F. Brown as superintendent of streets of the City of Oakland, bearing date September 8th, 1915, and countersigned by the mayor of said City of Oakland, which said warrant is in the words and figures following, to wit:

Warrant.

By virtue hereof, I. Perry F. Brown, superintendent of streets of the City of Oakland, County of Alameda and State of California, by virtue of the authority vested in me as superintendent of streets, do authorize and empower Marsh Bros. & Gardenier, (Inc.), agents or assigns to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be its warrant for the same.

165 Serial bonds bearing interest at the rate of seven (7%) per cent per annum, and extending over a period ending five years from and after the second day of January next succeeding the date of said bond, an even annual proportion of the principal sum thereof, payable by coupon on the second day of January every year after their date, and the interest payable semi-annually by coupon on the second days of January and July, respectively, of each year, are to be issued to represent the cost and expenses of the work described in the Assessment and in the manner and form prescribed by law; and notice is hereby given that a bond in such series will issue to represent each assessment of twenty-five ($25.00) dollars, or more, remaining unpaid for thirty days after the date of this wararnt or five days after the decision of the city council of said City of Oakland upon an appeal.

At said City of Oakland the 8th day of September, A. D. 1915.

PERRY F. BROWN,
Superintendent of Streets and ex-Officio City Engineer.

Countersigned:
J. L. DAVIE,
Mayor of the City of Oakland.

Recorded September 8th, 1915.
PERRY F. BROWN,
Superintendent of Streets and ex-Officio City Engineer.

166 5. A sufficient contractors' return endorsed upon said warrant, made and signed by E. L. Marsh, the duly authorized agent of said defendant Marsh Bros. and Gardenier, Inc., and verified by the oath of said E. L. Marsh duly administered by a competent person on the 6th day of October, 1915, which return states that on the 2nd day of October, 1915, between the hours of 9 a. m. and 4 p. m. of said day, said E. L. Marsh as the agent of and in behalf of said Marsh Bros. and Gardenier, Inc., did enter upon each of the lots of land described in plaintiffs' complaint as assessment numbers, 1, 2, 3, 46, 47, 48, 49, 50, 52, 53, 55, 76 to 89 inclusive and 91 and 92, and with said certificate, assessment, diagram and warrant above mentioned, in a loud and audible tone of voice, publicly made demand for the payment of the amount of money for which said lot of land had been assessed by said assessment, from the unknown owner thereof, upon said lot of land, and that on the 4th day of October, 1915, between the hours of 9 a. m. and 4 p. m. of said day, said E. L. Marsh as the agent of and in behalf of said Marsh Bros. and Gardenier, Inc., did enter upon each of the lots of land described in plaintiffs' complaint as assessment numbers 250, 254, 255, 271, 272, 273, 274, 319, 337, 338½, 339 and 389, and

167 with said certificate, assessment diagram and warrant above mentioned, in a loud, audible tone of voice, publicly make demand for the payment of the amount of money for which said lot of land had been assessed by said assessment, from the unknown owner thereof, upon said lot of land.

That each one of said lots or pieces of land, upon which, severally, demand of payment was made as aforesaid, was assessed in said assessment to an "unknown" owner.

At the foot of said contractors' return and endorsed thereon is the following, viz: Filed Oakland, Cal., Oct. 6, 1915, Perry F. Brown, superintendent of streets and ex-officio city engineer of the City of Oakland, by Walter N. Frickstad, deputy superintendent of streets. Recorded Oct. 8th, 1915, Perry F. Brown, superintendent of streets and ex-officio city engineer of the City of Oakland, by Walter N. Frickstad, deputy superintendent of streets.

Plaintiffs offered and there was received in evidence and marked

"PLAINTIFFS' EXHIBIT No. 7"

resolution No. 11903 N. S. of the city council of the City of Oakland, which said resolution is in the words and figures following, to-wit:

168 Oakland City Council.

Resolution No. 11903, *N. S.*

Introduced by Commissioner Baccus.

Form approved.
WILLIAM H. O'BRIEN,
Deputy City Attorney.

Resolution upon appeal of property owners from assessment made by superintendent of streets on Sept. 8, 1915, in matter of improvement of Broadway and Patton streets under resolution of intention No. 9397, N. S., setting aside assessment and directing superintendent of streets to make and issue a new warrant, assessment, and diagram to conform to decision of council in relation thereto.

Whereas:

A. J. Brocklehurst, W. A. Pryal, J. A. C. Macdonald, Catherine Heimbold, Gustav Brause, E. Spiganoviz, Florence D. Marx Greene, Wesley Plunkett, Fay M. Oliphant, Geo. M. Mott, Jr., Guy Hyde Chick, John Reyes, James Kirkland, F. B. Norton, W. W. Norton, Geo. Robinson, and Marian L. Stebbins, severally the owners of real property situated within the assessment district described in the assessment hereinafter mentioned, did on the 5th day of October, 1915, appeal to this council from the assessment made and issued by the superintendent of streets of the City of Oakland on the
169 8th day of September, 1915, to cover the costs and expenses of the work of excavating, constructing culvert, conduits and otherwise improving Broadway and Patton street as described in resolution of intention No. 9397 N. S. of this council, and in the contract for said work dated February 17th, 1915, entered into by the superintendent of streets of said city with Marsh Bros. & Gardenier Inc., the contractors, by briefly stating their objections to said assessment in writing and filing the same with the clerk of this council, and

Whereas:

Chas. Butters, the owner of real property situated within said assessment district, did on the 6th day of October, 1915, appeal to this council from said assessment, by briefly stating his objections to said assessment in writing and filing the same with the clerk of this council, and

Whereas:

Oakland, Antioch and Eastern Railway, a corporation, the owner of real property situated within said assessment district, did on the 7th day of October, 1915, appeal to this council from said assessment, by briefly stating its objections to said assessment in writing and filing the same with the clerk of this council, and

Whereas:

Notice of the time and place of hearing said appeals, as
170 fixed by this council, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, has been posted conspicuously by the clerk of this council, on the bulletin board near the chamber door of this council for five days, and

Whereas:

This council has duly and fully heard said appeals and said appellants and all persons interested in said work or said assessment, and has also heard the testimony of witnesses duly sworn, in the matter of said assessment and of said appeals,

Now therefore, it is hereby

Resolved:

That said assessment made and issued as aforesaid by said superintendent of streets on said 8th day of September, 1915 and recorded in the office of said superintendent of streets of said city in volume 13 of street assessments of said city at page 1 thereof and following, to cover the costs and expenses of said work, be and the same is hereby set aside, and the said superintendent of streets of said City of Oakland is hereby instructed and directed to make and issue to Marsh Bros. & Gardenier, Inc., the contractors, a new warrant, assessment and diagram to cover the total amount of the costs and expenses of said work described in said resolution of inten-
171 tion No. 9397 N. S. of this council, adopted December 14th, 1914, and in said contract, which said total amount of said costs and expenses of said work this council hereby finds and determines to be the sum of $27,978.68.

It is further hereby resolved that said superintendent of streets be and he is hereby instructed and directed to make and issue said new warrant, assessment and diagram in accordance with law, and thereby to assess said sum of $27,978.68 upon the several pieces, parcels, lots or portions of lots, and subdivisions of land, in said assessment district described in said resolution of intention No. 9397 N. S., to wit: Upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land, and this council hereby finds and decides and determines that said several lots, portions of lots or subdivisions of land are benefited by said work and improvement in the proportions and in the amounts set forth in the table of assessments hereinafter set forth.

It is further hereby resolved that in said table of assessments, the figures under the heading "Number of lot on diagram" in each case are used to describe a particular lot of land in said assessment dis-
172 trict, as said lot of land is correspondingly numbered upon the diagram of said assessment district approved by this council on the 6th day of July, 1915, by resolution No. 11025 N. S. and thereafter filed in the office of said superintendent of streets on September 8th, 1915, and recorded in said office with said first above mentioned warrant and assessment in volume 13 of street assessments of said city at page 1 thereof and following, and that the amount which shall be assessed upon and against each lot of land by said superintendent of streets in making said new assess-

ment, is set opposite the number of said lot, and under the heading "Amount of assessment;" upon said diagram the number of each of said lots of land is denoted by a figure or figures enclosed by a circle.

Table of Assessments.

Number of lot on diagram.	Amount of assessment.
1	145.32
2	238.91
3	209.19
4	38.11
5	27.60
6	25.36
7	25.63
8	25.63
9	25.63
10	25.72
11	29.41
173 12	.39
12½	6.59
13	5.63
14	5.63
15	5.64
16	2.93
17	2.93
18	43.95
19	17.23
20	.16
21	162.64
22	234.45
23	487.54
24	37.16
25	25.63
26	25.63
27	25.63
28	25.63
29	25.63
30	25.63
31	25.63
32	25.63
33	25.63
34	25.63
35	2.74
36	2.69
37	2.69
38	2.69
39	2.69
174 40	2.69
41	2.69
42	2.72

Number of lot on diagram.		Amount of assessment.
43		2.69
44		2.69
45		2.89
46		12.18
47		7.27
48		6.40
49		663.27
50		1,205.27
51		61.49
52		1,112.78
53		132.77
54		13.84
55		3,144.79
56		21.91
57		22.54
58		20.65
59		21.09
60		30.06
61		16.06
62		25.39
63		21.49
64		20.98
65		20.77
66		23.45
67		25.48
	68	26.14
175	69	28.45
	70	30.94
71		29.84
72		22.35
73		21.80
74		24.17
75		35.76
76		31.10
77		38.28
78		34.37
79		28.55
80		26.42
81		26.75
82		22.58
83		24.94
84		27.68
85		28.08
86		27.05
87		24.24
88		23.72
89		19.78
90		1.79
91		7.45

Number of lot on diagram.		Amount of assessment.
92		14.56
93		12.53
94		13.38
95		13.38
96		13.38
	97	15.51
176	98	14.42
	99	11.99
100		14.33
101		16.18
102		18.18
103		21.52
104		23.59
105		22.02
106		21.78
107		25.52
108		26.07
109		26.27
110		24.81
111		26.17
112		21.66
113		22.35
114		16.70
115		11.34
116		10.42
117		24.63
118		21.87
119		25.25
120		26.72
121		29.56
122		21.90
123		20.51
124		20.42
125		17.67
	126	23.54
177	127	19.38
	128	3.70
129		15.28
130		16.58
131		16.24
132		17.32
133		22.51
134		22.14
135		103.58
136		34.68
137		37.69
138		97.14
139		34.83

Number of lot on diagram.		Amount of assessment.
140		27.35
141		27.18
142		22.86
143		18.62
144		7.77
145		9.36
146		14.29
147		24.89
148		19.68
149		19.85
150		26.27
151		1.77
152		16.54
153		22.66
154		21.39
	5	31.06
178	56	556.07
	56½	24.62
157		25.07
157½		22.50
158		19.54
158½		19.96
159		19.96
159½		20.94
160		22.42
160½		21.87
161		20.56
162		20.00
163		16.77
164		12.81
165		17.00
166		15.54
167		20.82
168		22.11
169		23.19
170		22.72
171		14.02
172		10.46
173		14.96
174		21.03
175		18.79
176		14.39
177		14.01
178		14.22
	179	14.02
179	180	14.74
	181	15.71
182		20.98

Number of lot on diagram.	Amount of assessment.
183	17.88
184	14.86
185	11.70
186	16.95
187	21.78
188	23.19
189	25.92
190	18.53
191	20.96
192	23.59
193	7.38
194	11.84
195	11.76
196	13.65
197	11.78
198	16.57
199	20.70
200	12.24
201	28.46
202	26.92
203	34.94
204	22.70
205	21.09
206	23.29
207	31.46
208	13.57
180 209	251.75
210	23.18
211	27.63
212	14.26
213	16.38
214	21.00
215	28.55
216	7.59
217	8.64
218	7.34
219	7.91
220	9.72
221	10.38
222	10.52
223	8.62
224	9.28
225	5.67
226	6.87
227	7.47
228	6.34
229	6.77
230	7.57

Number of lot on diagram.		Amount of assessment.
231		9.09
232		8.57
233		10.28
234		10.38
235		7.33
236		6.37
	237	6.37
181	238	7.11
	239	11.99
240		1,249.46
241		245.63
242		100.16
243		154.08
244		197.63
245		9.29
246		14.99
247		12.14
248		7.64
249		27.58
250		28.93
251		13.19
252		7.85
253		4.41
254		27.31
255		41.91
256		15.44
257		11.58
258		11.26
259		22.66
260		21.98
261		22.90
262		25.16
263		27.96
264		28.55
265		27.13
	266	25.24
182	267	22.29
	268	21.29
269		20.28
270		19.21
271		18.73
272		18.47
273		17.68
274		15.41
275		1.06
276		9.18
277		12.31
278		11.61

Number of lot on diagram.		Amount of assessment.
279		11.40
280		90.22
281		39.17
282		18.49
283		17.05
284		14.85
285		14.33
286		12.87
287		13.70
288		13.31
289		14.68
290		12.93
291		20.07
292		15.34
293		23.46
294		23.27
	295	18.72
183	296	11.67
	297	11.64
298		13.02
299		13.86
300		14.86
301		16.08
302		13.35
303		4.17
304		1.28
305		9.57
306		10.42
307		11.42
308		12.56
309		13.83
310		29.29
311		59.93
312		32.58
313		125.68
314		43.84
315		45.79
316		92.36
317		47.12
318		77.60
319		398.69
320		116.13
321		143.65
322		.91
323		3.86
	324	25.09
184	325	8.13
	326	5.18

Number of lot on diagram.		Amount of assessment
327		7.68
328		100.87
329		39.66
330		765.06
331		3.51
332		562.09
333		175.19
334		106.45
335		152.99
336		1,599.54
337		71.48
338		25.83
338½		1,163.46
339		908.09
340		———
341		———
342		———
343		———
344		———
345		———
346		———
347		———
348		161.44
349		340.76
350		168.84
351		472.02
	352	79.81
185	353	4.76
	354	4.71
355		5.30
356		7.05
357		10.32
358		.28
359		10.46
360		9.88
361		6.28
362		5.64
363		4.70
364		.94
365		5.64
366		5.64
367		5.64
368		5.64
369		5.64
370		5.64
371		5.64
372		5.64
373		22.71

Number of lot on diagram.		Amount of assessment.
374		23.59
375		24.46
376		25.34
377		26.21
378		27.09
379		27.96
380		28.83
	381	.94
186	382	26.05
	383	30.57
384		35.14
385		30.13
386		34.63
387		34.63
388		34.63
389		1,059.77
390		12.35
391		12.35
392		14.63
393		14.63
394		1.01
395		20.69
396		20.17
397		19.65
398		19.14
399		18.61
400		18.10
401		17.57
402		17.05
403		7.30
404		9.23
405		29.01
406		16.96
407		28.29
408		17.56
409		17.56
410		17.56
	411	17.56
187	412	17.56
	413	17.56
414		17.56
415		17.56
416		15.27
417		27.94
418		2.62
419		13.98
420		4.59
421		71.74

Number of lot on diagram.		Amount of assessment.
422		73.95
423		73.95
424		73.95
425		36.98
426		36.98
427		73.95
428		73.95
429		73.95
430		28.29
431		28.29
432		28.29
433		28.29
434		128.29
435		1.54
436		1.42
437		27.89
438		28.29
439		28.29
440		28.29
	441	128.29
188	442	110.07
	443	103.09
444		77.42
445		72.98
446		68.51
447		83.55
		$27,978.68

In council, Oakland, Cal., December 28, 1915.

Passed by the following vote:

Ayes—Commissioners Anderson, Baccus, Edwards, Jackson and President Davie—5.

Noes—None. Excused from voting—none. Absent—None.

Attest:

J. L. DAVIE,
Mayor of the City of Oakland, Cal.

Attest:

L. W. CUMMINGS,
City Clerk and Clerk of the Council of the City of Oakland, Cal.

Filed office of City Clerk and Clerk of the Council of the City of Oakland, Cal., December 28, 1915.

L. W. CUMMINGS,
City Clerk.
W. W. CHAPPELL,
Deputy.

189 MELVILLE AUERBACH, being called as a witness on behalf of the plaintiffs, and being duly sworn, testified as follows:

I am deputy city engineer of the City of Oakland, and as such have charge of the engineer's office. I remember the work done on Broadway and Patton street under resolution of intention No. 9397.

Mr. Boland:

Q. In doing this grading work, to what grade was Broadway graded?

Mr. Soto: To that we object upon the ground that the question of whether or not this work was done to any particular grade, whether to the official grade as it actually existed, is a matter of law, as to whether they would not now be barred in this proceeding. The matter was entirely relegated to the city council upon appeal from the assessment, on the ground that the work has not been done in accordance with the plans and specifications or to the official grade. If it is the object to show the work was not done to either the city or official line of grade, it is incompetent under the issues.

The Court: It may go in under the objection.

A. Broadway was graded to the grade as prescribed in ordinances Nos. 537 N. S., 573 N. S. and 749 N. S.

190 Q. Can you tell us to what grade Patton street was graded?

Mr. Soto: The same objection.

The Court: The same ruling.

A. It was graded in accordance with ordinance No. 749 N. S.

Q. In estimating the quantities to be excavated, what grades were you authorized to make?

Mr. Soto: We make the same objection on the same ground that they are foreclosed by reason of action of the city council on appeal.

The Court: The objection is overruled.

A. The amounts were estimated in accordance with the ordinance above quoted.

Q. Can you tell us the length of Broadway within the district within which the work was done?

Mr. Soto: I take it your honor, that our other objections will be deemed taken to all this character of testimony.

The Court: Yes, you don't have to object to each particular question asked.

Mr. Boland: It may be assumed it was taken to all the testimony along that line.

The Witness: The length of the work on Broadway was 1,324 feet, that is in round numbers. On Patton street, exclusive of Broadway portion of that, it would be about 396½ feet.

191 Q. Can you give us the surface contours of the work just on Broadway?

A. I have the profile here.
Q. Does it show to what depth below the surface the various grading was done?
A. Yes, sir.
Q. Does it give the maximum cut?
A. The maximum cut about 33½ feet.

Plaintiffs offered in evidence said profile map and the same was received in evidence and marked

"PLAINTIFFS' EXHIBIT 'G.'"

[Inserted in original transcript on file with the clerk of the Supreme Court.]

(Here follows profile map marked page 191½.)

Mr. Wright:

Q. Can you with reference to the property covered by the assessment, locate these cuts from this map?
A. Yes, sir.
Q. I hand you plaintiffs' exhibit 8, being the assessment diagram; will you locate some of the property with reference to those cuts?
A. Well now, that is quite a task.
Q. Can you locate this deep cut for instance this 33 foot cut which you were showing?

Mr. Shaw: We have an understanding that our objection applies to all of this testimony.
192 The Court: Yes.

The Witness: The deep cut is located about 200 feet north of Ocean View drive on the east side of Broadway.
Q. Can you determine whose property is opposite that, what number is on the assessment list?
A. No. 49.
Q. Is there any other adjoining assessment property No. 50?
A. Yes, sir.
Q. What is the cut there?
A. Well that varies from—the deepest cut will run about 32 feet.
Q. Will you now refer to that ordinance No. 573 purporting to change the grades; is that property to which you just referred lot No. 50 on the assessment list, on the line of the grade as changed by ordinance No. 573?
A. A part of it is, yes sir.
Q. Will you now, with the ordinance 573 in your hands, and assessment list and the map to which you have referred, indicate other numbered property which is also on the line of grade as changed and where there is a cut?

Mr. Soto: We object to that question. The assumption is that it assumes there was any changes of grade.

937

BROADWAY

Bay View Ave.

Grade Change Ordinance

PLAN & PROFILE
of
BROADWAY
From
Clifton St. to Mullerly
Oakland, Cal. F. C. Turner
March 5 1912 City Engineer

North or East Line BLUE
Center Line BLACK
South or West Line BROWN
SCALES Horizontal 1 in. 50 ft.
Vertical 1 in. 5 ft.

1912

Mr. Wright: He has the ordinance in his hand changing the grade.

193 Mr. Soto: That is a matter of construction to say whether it changes the grade or not. We object to that as calling for a conclusion of law.

The Court: Answer the question.

A. Nos. 18, 19, 21, 22, 3, 2, 1, 50, 23, 49.

Mr. Boland:

Q. Can you tell us what grade the railroad crosses Patton street?

Mr. Soto: We object to that as irrelevant and immaterial.

The Court: Overruled.

A. You mean the grade with reference to——

Q. With reference to the established grade.

A. Well of course, that——

Q. I mean, what is the grade of the railroad as the same is established in 573, assuming that established the grade?

A. No. The grade of the railroad is not to the official grade as established.

Q. Do you know how much above or below it is?

A. Well, it is very considerable. It runs above grade, if I am not mistaken, at the eastern end, below grade and some four or five feet at the western end.

Q. Where the railroad crosses Patton street, do you know?

A. If my memory serves me right, it is probably a foot or so above grade.

194 The Witness: The blue print, plaintiffs' exhibit No. 6 was prepared about the same time as the time of the adoption of resolution No. 9397.

A. C. Frost, being called as a witness on behalf of the plaintiffs, and being duly sworn, testified as follows:

I am chief deputy clerk of the department of streets of the City of Oakland and have charge of the records in the office of the superintendent of streets. There was no estimate as to the cost or probable cost of this work made by my office prior to the adoption of resolution of intention No. 9397.

Mr. Wright:

Q. In making the assessment, that original assessment, what was the basis of your computation as to the amount to be assessed against the particular pieces of land within the district?

Mr. Soto: I object to that as irrelevant, immaterial and incompetent. In any case, that is a matter to be determined by the city council on appeal. It seems they have determined it by sustaining the appeal.

Mr. Wright: On that question, the question is as to the damages sustained within the district.

The Court: Where is that allegation?

195 Mr. Wright: That is an allegation, paragraph 16 on page 15. This second assessment, if your honor remembers, is under the direction of the city council. In regard to that, the superintendent of streets would seem to have no discretion under the law. The first assessment was made according to some certain plan.

The Court: Which assessment was set aside.

Mr. Wright: I am trying to lead up to the question whether that second assessment——

Mr. Soto (interrupting): That question cannot be determined here. The city council has to determine that; and the decision of the city council, under the provisions of the statute, is made final and conclusive. The assessment must be made by the superintendent of streets following the direction of the city council. There is no appeal from that to the city council.

The Court: I think I will admit the testimony and you can argue the admissibility of it afterwards. There is no jury. I will admit it.

Mr. Wright: It will be for what it is worth your honor.

Mr. Shaw: It will be understood we have an objection to all testimony, oral questions propounded along this line, upon the

196 ground it is irrelevant, immaterial and not within the issues raised in the case.

Mr. Soto: And it cannot be gone into in this proceeding.

Mr. Wright:

Q. In making the first assessment, Mr. Frost, on what theory did you proceed in assessing the particular pieces of land in the district?

A. The amount that they were benefited, according to the total amount to be raised by the assessment.

Q. In other words, you took the total amount of the assessment and placed it upon the whole district, did you not?

A. Yes, sir.

Q. And then you proportioned that in some way?

A. Yes, sir.

Q. According to what method did you apportion it?

A. I had to adopt a new plan for Broadway, for example, and a new plan for Patton street, new owner plan or street plan, partially both, a relative plan to arrive at the benefit that each piece of property received from the work.

Q. What was the plan on which you computed the benefit on Patton street?

A. I don't remember.

197 Q. You have those data, have you not, from which you computed all that assessment?

A. I believe so.

Q. Will you produce it here?

A. Yes.

The court here adjourned until the succeeding day.

On the succeeding day the witness A. C. FROST was recalled in behalf of plaintiffs and testified as follows, to wit:

Mr. Wright:

Q. Did you find the data we were asking for yesterday?
A. I did.
Q. Now, without my asking detailed questions, I am sure you can tell us very quickly and clearly just how the assessment was figured in that first assessment.

Mr. Shaw: The same objection I made yesterday to Mr. Frost's testimony applies to this testimony.
The Court: So understood.

A. When the Council of the City of Oakland voted a district within which all properties were to be assessed for benefits for the work of grading Broadway and Patton street, it was with the
198 idea that those benefits were to be based on the amount of money that was to be paid to the contractor by his bid, plus the cost of incidental expenses, in this case amounting to $27,978.68. In the opinion of myself, the benefits assessed against the individual properties within this district did not represent the full benefit that these properties received from this work. It is only their—each one represents only their proportionate benefits according to the amount of money that was to be raised. In making these assessments, the law sets forth that they shall be made according to the judgment of the superintendent of streets. In this case, to arrive at those benefits, there is a system adopted by which benefits are relative. They differ in all assessments, no two being the same. In this case we took and adopted zones of benefits. Those zones of benefits were only secondary benefits. Before those secondary benefits were achieved, there were primary benefits that were assessed against certain pieces of property. Those are the areas that received a more direct benefit than the others. The primary benefits in this assessment were represented by property having a direct frontage on Broadway, property having a direct frontage on 59th street, property fronting on Keith avenue, property fronting on Patton
199 street. To arrive at a basis of computing benefits, I took an arbitrary amount of money; to arrive at a benefit that each front foot receiving the largest benefit, in this case Broadway, would get. Then using that as a standard, proceeded to lay out, with a relation of benefits to these other streets receiving less benefits than I considered Broadway did. In that way, I arrived at the amount of money which was the proportionate total amount to be raised. Then, in taking my secondary benefits, I took the district itself as adopted by the council, and laid that off into zones of benefits. One zone represented by the district line on the east, running from a point approximately 100 feet westerly of the east line and a point probably 150 feet north of the south line, and extending to the creek, was designated as "District D." Adjoining that district——

Mr. Shaw (interrupting:) Those are the zones?

A. These are the zones. Adjoining that district, and leaving in the parcel of land containing 300,000 square feet, was a parcel of land that is described as bounded on the north by Laurel road, on the south by the tract line, on the east by the aforesaid 300,000 square feet plot line, and on the west by an irregular tract of land, That was designated as "District B." Taking into consideration the topography of "District B," lying on a steep, inaccessible
200 hillside, not readily usable for subdivision purposes at present, and part of the drainage area of little Lake Chabot, was designated as the lowest—as the district receiving the lowest benefit of all in the assessed district. In going through the other eight or nine zones computed, this was used, as to square feet of this was used as a basis for judging the relative benefit received by the other zones, as a matter of comparison. This was No. 1.

In viewing the next parcels of land, computing the benefits that they would receive, the benefits to that zone were designated two; that is, meaning that the benefits to that zone were twice what zone "B-1" was. Going on to another one, that was designated as "3;" in other words, that was benefited three times what zone "B-1" was.

We carried this thing forward to zone "C," zone "D," zone "E," zone "A" and other zones, computed in this assesment. Their benefits ran in the rations of one, two, three, six, nine, twelve, and so forth. These are only as to the secondary benefits. Some of these properties that received secondary benefits also received primary benefits, being frontages on streets contiguous to Broadway. Others that the grading of Broadway would put in a better line of communication, other streets that the benefits would be greater
201 on than that in these districts, more easily computed by setting on them a basis as to method of computation and frontage price for benefits. And, taking these all together, computing the number of square feet in each one of these districts, and using the factors then found, we discovered that the price arbitrarily put on Broadway as a basis of primary benefits was too high. We would then go and reduce that factor to a lower one to get the primary benefits and the secondary benefits more in accord, as to the benefits of the property received according to the money to be raised. In doing these things, we would go along and change the factors many times, as was done in this case. Sometimes, on making the computation, we would find that our judgment was incorrect at first as to the relative value of benefits between different zones, secondary benefits those were recomputed, new factors used, all balanced again, and still found that there were inequitable. By doing this many times, we arrived at certain factors, which, in our judgment, were the correct factors of benefits according to the amount of money to be raised by this assessment, but not necessarily the benefits that the property received from the work. Those different benefits, sometimes an individual property having one benefit, sometimes two, sometimes three—I think three benefits is the highest any
202 one property got. Those were all taken and placed together, and the basis of an assessment arrived at from them. After that we had to take simply the grading of Broadway from the south-

erly line of work to Patton street. Then there was another factor that entered into the benefits to some of these properties. That was the grading of Patton street, being a connecting street betwen Chabot road and Broadway itself. The benefit of that grading was also gone into in the same way. After that there was a concrete culvert built in the creek over which Patton street was passed in these proceedings. The cost of that was figured, also computed as to benefits to different properties affected thereby. After all these factors were taken into consideration and added together, we arrived at what we thought was a just assessment on the property, and that assessment was issued——

Mr. Wright:

Q. Just one moment. You have I presume, the concrete statement of the factors that went into the different assessments, haven't you, before the council? If I am not mistaken, you told—take Broadway: What were the elements that went into the assessment of the property abutting on Broadway?

A. There were different elements entered into it.

203 Q. If you will refer to the assessment diagram of property on the east side of Broadway, for example, if you will give us the concrete data——

A. What assessment number, Mr. Wright?

Q. Assessment No. 49.

A. What way do you want to know what that benefit was?

Q. What were the factors entering into the calculations of the benefits to Lot 49?

A. Frontage and work.

Q. And what did you assess against it for frontage and work?

A. In money.

Q. Per foot. What was the rate of assessment per front foot for frontage and work?

A. $3.00.

Q. $3.00 per front foot for frontage on Broadway?

A. Yes, sir.

Q. Anything for frontage on Ocean View?

A. No, sir, nothing.

Q. Nothing for frontage on Ocean View?

A. No, sir.

Q. Lot 50?

A. Frontage on Broadway, what was known as a "D" benefit.

Q. How much per foot, how much for frontage on Broadway?

A. 1,096.26.

Q. Wasn't there a way you calculated that?

204 A. Yes. I can't tell you all these calculations, Mr. Wright. I cannot make them all.

Q. 1,096?

A. 1,096.26. It was a matter of months' calculation.

Q. What was the factor—that is what I am asking.

A. I presume it was $3.00, so far as I can locate it now.

Q. $3. also. And was anything assessed against that lot for frontage on Ocean View?
A. There was $45.46.
Q. Anything for its area?
A. No, sir, that "D" rate was computed on its area, on a portion of its area.
Q. Well, assessment No. 51.
The Court: Whose property?
A. I don't know, Judge, I am sure.
Mr. Wright: I don't know, your honor.
The Witness: That was based on 4,805-2 square feet, 4,805½ square feet, and was assessed for $52.66.

Mr. Wright:

Q. Turn to sheet 5, lot No. 55, assessment No. 55.

Mr. Shaw: What property is that?
Mr. Wright: The Berkeley Rock Company.

The Witness: That was assessed for three benefits, a "D" benefit and "E" benefit and frontage benefit.
205 Mr. Wright: What was the frontage benefit there?
A. $2,083.05.
Q. $2,083?
A. And five cents.
Q. Have you got how much that was per front foot?
A. No, sir.
Q. What is the "D" benefit?
A. The "D" benefit was $14.79.
Q. What was that benefit for?
A. The property having a frontage on Ocean View drive.
Q. And what was the "E" benefit for?
A. A benefit that property that had an access on either street, either Broadway or Ocean View drive.
Q. How much was that?
A. $862.71.
Q. Based on what figure, on what area?
A. Area, yes, on an area of 20,115.41 square feet.
Q. That does not appear on the diagram?
A. No, sir, it does not appear on the diagram.
Q. Then you have, Mr. Frost, a complete statement of calculations, have you, in your hand there?
A. For what it is worth to any one outside.
206 Q. How many kinds of benefits are figured on there on that statement you have in your hands, how many classes of benefits were there all together?
A. Twelve classes of benefits.
Q. Twelve classes of benefits. Now, what was done after you had figured this first assessment, and when that assessment was set aside by the council? What was done with the assessment as you first figured it, that is, the first assessment——
A. By whom?

Q. When you proceeded under the council's direction to levy a new assessment.

A. What was done by myself, you mean?

Q. Yes, in figuring that new assessment.

A. I persuaded the council——

Mr. Shaw: Did you refer to after the direction of the council to make a new assessment? You remember that was a resolution.

Mr. Wright: Quite true; based on a computation furnished by Mr. Frost.

A. No, sir, it was not.

Mr. Shaw: Your question related to what occurred, what took place after that resolution; didn't you mean that?

Mr. Wright:

Q. On what basis was the difference between the first assessment and the assessment as directed by the council after the first assessment was set aside, calculated?

207 Mr. Shaw: I object to that as immaterial.

The Witness: I don't know. It was not figured——

Mr. Wright:

Q. Did you make deductions of certain property?

A. No, sir.

Q. Was not figured on certain property?

A. No, sir.

Q. At all?

A. No, sir.

Q. I suppose that will appear on its face, on what pieces——

A. No, sir. I might tell you it was figured by Mr. Ross Morgan.

Q. By Mr. Ross Morgan?

A. Yes, sir. I think, Mr. Wright, I can clear you up if you will allow me to.

Q. Yes, I will allow you to, certainly; I will be glad to have you.

A. The council adopted a resolution accepting the assessment as set forth by Mr. Ross Morgan on sheets furnished by him. After other hearings and due consideration, they found that the assessment as offered by him did not represent their ideas at all, and then they consulted us as to a method that would meet their ideas, and that was really the third assessment that was offered to the council, as the one I believe you have reference to. That was formulated under a resolution setting forth the exact benefit that each piece of
208 property was to receive according to the benefits the council thought it should get.

Q. Then they did not proceed upon any computation made in your case at all?

A. Why, yes—not the second assessment. The assessment Mr. Morgan offered them.

Q. I mean the one which you were directed to record; I mean the

last one, the one in controversy here, the one enjoined by this preliminary injunction, that is the one I am talking about.

A. That was a computation from our office, yes.

Q. What was the difference in the computation made, regarding deductions made, and how distributed? You explained that very clearly.

A. The council found that a charge of 50 cents a front foot as one of the basis for benefits in the first assessment was not justified.

Q. Where?

A. On the Chabot road. And consequently, they deducted 50 cents a front foot on Chabot road, and consequently they instructed us that the benefits on the Chabot road were too high, and that on the balance of the property was to low, and the benefits of the
209 50 cents a front foot that was assessed on Chabot road should be equally distributed over all the property in the assessed district.

Upon cross-examination, the witness testified as follows:

The matter of the appeal was before the council for months. A great many hearings were had. I was present at the meetings as was also Mr. Wright, Mr. Butters and Mr. Manning. There was much testimony taken before the council concerning the proper method of making the assessment and the city council visited the assessment district for the purpose of considering the business.

Mr. Wright: One question, Mr. Frost.

Q. When the council found that the assessment which you had formerly made on Chabot road was excessive to the extent of 50 cents per front foot, on the Chabot road, it was necessary for them to put that excess somewheres else in the district, if they took it off the property upon the Chabot road?

Mr. Soto: We object to that. It is self evident.

The Court: I don't think it is necessary to offer any evidence on that.

Mr. Wright:

Q. When the 50 cents on Chabot road was taken off the property on Chabot road and distributed all over the district, was it dis-
210 tributed over the other portion of the district, or over all the district including property on Chabot road?

A. It was distributed over the whole area of the district.

Q. In accordance with what principle?

A. In accordance with the principle that the city council said that the benefits on Chabot road had been placed too high, and benefits on the other property was too low.

Q. I don't mean that. I mean according to the computation, according to the square feet of the district.

A. The number of square feet in the district.

Q. So that each parcel of land took its portion?

A. In proportion to the number of square feet of each parcel of land within the district.

CHARLES BUTTERS, being called as a witness on behalf of the plaintiffs, and being duly sworn, testified as follows:

I am one of the plaintiffs in this action. I have had experience in buying land in the assessment district and I know the values of the land.

Mr. Wright:

Q. What effect upon the value of your land in this case
211 has the improvement of Broadway and Patton street had?

Mr. Shaw: I object to that as irrelevant and immaterial and not within the issues raised in this case; and on the further ground that plaintiffs are estopped in this case from going into the question.

The Court: That is the same objection made to the other testimony; let it go in subject to the objection. Objection overruled.

A. I should say that it had no effect, has not in the least added to its value.

Q. Will it give you any access you did not have before?

A. It does not.

Q. You are acquainted, Mr. Butters, with the cut made on Broadway in the course of this work?

A. I am.

Q. From Ocean View Drive onward towards the north?

A. I am acquainted with it.

Q. By the reservoir on the top of the hill there?

A. I am acquainted with it.

Q. Have you had any experience in excavating ground?

A. I have.

Q. Tell us briefly what that experience has been?

212 A. I have been engineer on construction and excavating and do a great deal of mining work for the last thirty or forty years.

Q. In this cut there on Broadway beginning at Ocean View drive and proceeding northerly, what is the character of the grounds through which that cut has been made?

The Court (after discussion): Objection overruled. I am going to take the evidence and determine the legal effect of it afterwards. It goes in subject to your objection.

A. That is a rock cut in which the—I could not—I would not give a geological description of it, but roughly speaking that is an easily decomposable rock in which there are masses of hard lumps, underlying these hard lumps are clayey slips, which when moist, let go the burden, and if these clayey slips are undercut they cannot hold the heavy, hard solid mass that lies on them. Now those clayey slips could not be seen in the smooth cut that was there, but naturally the inference that any engineer would make——

Mr. Wright: Confine yourself, Mr. Butters, to the statement as to what the character of that material is and we will come to that portion of your answer a little later.

A. The top of that hill is a mass of easily decomposed rock some of which is more decomposable than others. The hard lumps
213 lying in there are not so readily decomposable as the portions which lie in the slips or slides. This rock, these slides or slips when they get wet slide out of place.

The Witness: This could be readily seen in the small cut before this large work was commenced. This was obvious. Those slips would take place absolutely if this work were done and they did in fact occur as soon as the work was done. I know the property containing the reservoir marked 50 on the assessment diagram. The slide there went back 25 or 30 feet from the street line.

Mr. Wright: Has the value of that particular portion of the land there, including the reservoirs, been diminished by this work that was done on Broadway?

Mr. Shaw: The same objection.

The Court: Overruled.

A. I should say it was.

Q. I will first ask you what dimension is the reservoir?

A. It is 50 feet inside and 10 feet deep, excavated into the rock and made of about 18 inch brick wall, covered with a wooden house.

Q. To what extent is the value of that reservoir with just enough land to contain it, diminished by the work on Broadway?

Mr. Shaw: I object to that as irrelevant and immaterial and not within the issues of the case.

214 The Court: He can answer the question.

A. That has been absolutely destroyed. I speak of the value of the reservoir.

Q. What in your opinion was its value prior to the work being done?

Mr. Shaw: I object to any value on the same ground.

The Court: Overruled.

A. Well, I consider the value $2,000.00.

Upon cross-examination, the witness testified as follows:

I knew the work was going on. I made no objection to the extent of the district described in the resolution of intention. I did not receive any notice before the work was started. I saw the work when it started, but I was always under the impression that the work covered a very large district and the general impression of the people in that district was that Mr. Baccus of the street department had told us that there would be a very nominal assessment. I plead ignorance and should have known better, but I did not know that the district was so small and that there would be a large assessment on the district.

FRED E. REED, being called as a witness on behalf of the
215 plaintiffs, and being duly sworn, testified as follows:

I am and have been a real estate broker for eleven years, in Berkeley and Oakland. I am very familiar with the property involved in the resolution of intention for the improvement of Broadway and Patton street. I laid out Rockridge place and sold approximately a million dollars worth of property in the district. I am familiar with the property on the corner of Ocean View drive and Broadway, being the property marked 49 and 50 on the assessment diagram.

Mr. Wright:

Q. What has been the effect on those two parcels of the work done in grading Broadway along either boundaries?

Mr. Shaw: The same objection.
The Court: Subject to the same objection as heretofore made.

A. The parcel 49, there has been left a precipitous bank from which the dirt has dropped away. The height at the north end of parcel 49 is, I should judge, 27½ feet approximately and there has been a necessity created for a retaining wall.

Mr. Shaw: I move to strike out about the retaining wall.
The Court: Motion denied.

The Witness (continuing): If it is supposed to be entirely made use of for residence purposes, the effect on lot parcel 50, I
216 would say has been made such that it is absolutely useless for residential purposes, excepting in connection with the frontage on Ocean View Drive, which joins it.

Q. Is there any access from lot 50 to Broadway by way of the Broadway boundary?

A. None whatever.

Q. What is the condition of affairs there?

A. There is a precipitous bank there, I should judge, approximately 30 feet high and where access is impossible to the lot and if a person planned to use the lot for residential purpose with a Broadway frontage, it would be practically impossible.

Q. Does that diminish the market value of the lot, that condition of affairs?

A. I should say so, certainly.

Q. To any great extent?

A. Yes.

Q. Leaving out of consideration any special value of the reservoir on lot 50, has the market value of lot 50 been diminished and if so, to what extent, by the work done on Broadway?

A. I have made an estimate of the value of the lot as it is today and the value of the lot before the work was done and I estimate that the value of the lot is $2,087.50.

217 Q. $2,087.50 exclusive of any consideration of any special value of the reservoir on that property?

A. I consider it only from a residential point of view.

Upon cross-examination, the witness testified as follows:

I own some property in the district and I am president of the Rockridge Place Company and a stockholder in that corporation. That corporation holds property out there which is assessed. It would be to my benefit to have this assessment set aside.

R. W. KITTRELLE, being called as a witness on behalf of the plaintiffs, and being duly sworn, testified as follows:

I have been in the real estate business in Oakland since 1906. I am familiar with lots Nos. 49 and 50 on the assessment diagram, and also with the work done under resolution of intention No. 9397.

Mr. Wright:

Q. What effect has that work on Broadway had on the value of those lots?

Mr. Shaw: The same objection as to the other questions.
218 The Court: The same ruling.

A. Well, I would say that for residential purposes, that a great deal of that property—I can't tell the distance here very well—would be entirely eliminated for residential purposes.

Q. To what extent, in your opinion, has lot 50 been diminished in value by the work on Broadway?

A. I estimate the distance there of about 125 feet, and I should say that that lot before the work was done had a value something like $3,100——

Q. To what extent has it been decreased in value?

A. Well I would consider the lot is useless as a residence today without a great deal of money spent on it.

THOS. J. THOMPSON, being called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

I have been in the real estate business in Oakland for sixteen years and am familiar with lots Nos. 49 and 50 on the assessment diagram and with the work done under resolution of intention No. 9397.

Mr. Shaw: I understand I have the same objection.
The Court: Sure.

219 Mr. Wright:

Q. Is any cut along the line of those lots on Broadway?

A. Yes sir, there is a cut there at the deepest point of about, I should say, 30 or 31 or 32 feet.

Q. Has the value of those lots been affected in any way by the work on Broadway?

A. Yet it is; it has reduced the value of the property very materially.

Q. To what extent do you think it has reduced the market value of lot 49, that is, the corner lot?

A. We put no value on the corner lot, so far as the Broadway frontage is concerned.

Q. How about lot 50, which is the lot of the reservoir?

A. Lot 50, about 85 per cent of the value—it has been about 85 per cent of the value.

Plaintiffs offered and there was received in evidence the affidavit of posting notices of the passage of resolution of intention No. 9397 N. S., said affidavit being in the words and figures following, to wit:

Affidavit of Street Posting.

STATE OF CALIFORNIA,
County of Alameda,
City of Oakland, ss:

B. J. Nolan, being duly sworn, says as follows: That he
220 was at all times herein mentioned employed in the office of the superintendent of streets of the City of Oakland, that he was instructed by Perry F. Brown, then the said superintendent of streets, to post notices of the passage of resolution of intention, No. 9397 N. S. of the council of the City of Oakland, adopted December 14th, A. D. 1914, and that he actually posted said notice, identical with the printed copy of said notices which is annexed hereto and made a part hereof and filed herewith; that he posted said notices conspicuously along the line of said contemplated work or improvement, described in said notices at not more than three hundred (300) feet in distance apart, and not less than three in all, and when the work to be done was only upon an entire crossing or any part thereof, in front of each quarter block liable to be assessed; that he also posted said notices along all streets within the district described in said notices and chargeable for the expense of said improvement at no more than three hundred (300) feet in distance apart, but not less than three in all on each street.

This affidavit is made and filed by order of Perry F. Brown, superintendent of streets and ex-officio city engineer of the City of Oakland.

That affiant began the posting of said notices as herein specified on
the 21st day of December, A. D. 1914, and completed said
221 posting on the 22d day of December, A. D. 1914.

B. J. NOLAN.

Subscribed and sworn to before me this 22nd day of December, A. D. 1914.

[Seal of the City of Oakland.]

F. C. MERRITT,
Deputy City Clerk.

That attached to said affidavit and referred to therein is the following notice of improvement made and signed by the superintendent of streets of said City of Oakland, to wit:

Notice of Improvement.

Notice is hereby given, that on the 14th day of December, A. D. 1914, the city council of the City of Oakland passed resolution of intention No. 9397 N. S., to order the following street work to be done, to wit:

That Broadway from the production of the northeastern line of Patton street to a straight line drawn at right angles to the eastern line of Broadway at its intersection with the northern line of Ocean View drive, and Patton street from a line drawn parallel to and distant ten (10) feet southeasterly from the southeastern line of Fifty-ninth street to the western line of Broadway, each, be graded; also

That a concrete culvert, having a length of one hundred
222 forty-two (142) feet (measured along its center line) and maximum internal dimensions of seven and one-half (7½) feet in height by eight (8) feet in width, be constructed so that the center line, bearing north thirty-seven degrees thirty minutes east (N. 37° 30′ E.), of said culvert passes through a point on the southwestern line, produced, of Patton street, distant thereon four hundred thirty-five (435) feet southeasterly from the southeastern line of Fifty-ninth street, and the northeastern and southwestern ends of said culvert are distant, respectively (measured along the center line of said culvert), eighty (80) feet northeasterly, and sixty-two (62) feet southwesterly from said point on the southwestern line, produced, of Patton street; also

That a concrete curtain wall be constructed at each end and a concrete wing wall be constructed at the northeastern end of the aforesaid concrete culvert; also

That two (2) brick manholes with cast iron tops be constructed as follows: one on the center line of the aforesaid culvert at a point distant, thereon, thirty-three (33) feet southwesterly from the northeastern end thereof; and one on the northeastern curb line of Patton street distant three hundred fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

223 That a brick storm water inlet with cast iron top be constructed on the southwestern curb line of Patton street distant three hundrer fifty (350) feet southeasterly from the southeastern line of Fifty-ninth street; also

That a pipe conduit, having an internal diameter of fourteen (14) inches, be constructed from the first above named manhole to the second above named manhole; and a pipe conduit, having an internal diameter of ten (10) inches, be constructed from the second above named manhole to the aforesaid inlet;

Excepting, however, from the aforesaid work the grading of that portion of Broadway bounded as follows: on the northeast by the production of the southwestern line of Patton street; on the south-

east by a straight line drawn from a point on the production of the southwestern line of Patton street distant, thereon, one hundred (100) feet southeasterly from the western line of Broadway to a point on the western line of Broadway, distant, thereon, three hundred twenty (320) feet southerly from the southwesterly line of Patton street; and on the west by the western line of Broadway; also

Excepting such portions as are required by law to be kept in order or repair by any person or company having railroad tracks thereon.

All portions of the aforesaid culvert lying outside of Pat-
224 ton street and Broadway are within the right of way granted by H. S. Patton to the City of Oakland by that certain indenture recorded December 2, 1914, in volume 2284 of deeds, page 445, Alameda County records.

And said council does hereby determine and declare that the aforesaid work and improvement is of more than local or ordinary public benefit and will affect and benefit the district hereinafter described, which said district is hereby declared to be the district benefited by said work and improvement and that therefore the entire cost and expense of said work and improvement shall be and are hereby made chargeable against and shall be assessed upon said district, which district is within the City of Oakland, County of Alameda, State of California, and is particularly bounded and described as follows, to wit:

Beginning at the intersection of the center line of Ocean View drive with the production of the western line of lot 18 of Hillside Terrace, as said lot is shown on the map of "A re-division of Hillside Terrace," filed June 28, 1909, in book 24 of maps, page 80, Alameda County records; thence along the center line of Ocean View drive to the center line of Acacia avenue; thence along the center line of Acacia avenue to the center line of Brookside avenue; thence
225 northwesterly along the center line of Brookside avenue to the center line of Chabot road, as said road is shown on the map of the "Resubdivision of blocks 9, 10, 11, 12, 13, 14 and a portion of block 16 Rock Ridge Terrace," filed March 16, 1911, in book 26 of maps, page 15, Alameda County records; thence along said center line of Chabot road to the center line of Buena Vista avenue; thence along said center line of Buena Vista avenue to the production of the northeastern line of lot 16, block 6, aforesaid resubdivision of blocks in Rock Ridge Terrace; thence along said production of and along said northeastern line of lot 16 to the northeastern boundary line of the aforesaid resubdivision of blocks in Rock Ridge Terrace; thence southeasterly along said last named boundary line to the angle point thereon at the northeastern line of said Chabot road; thence continuing southeasterly along said last named boundary line a distance of six hundred (600) feet; thence in a direct line to the most southern corner of lot 3, block H of the "Claremont Chabot Tract," as shown on a map thereof, filed June 23, 1913, in book 28 of maps, page 28, Alameda County records; thence along the easterly boundary line of said Claremont Chabot Tract to the southwestern line of the Tunnel road; thence along said southwestern line of the Tunnel road to the eastern boundary line of

226 the City of Berkeley; thence southerly along said eastern boundary line to the southern boundary line of said City of Berkeley; thence westerly along said southern boundary line of the City of Berkeley to the center line of Eucalyptus road; thence along said center line of Eucalyptus road to the production of the eastern line of lot S of the "Eucalyptus Hill Claremont" tract, as said lot is shown on a map thereof, filed March 16, 1907, in book 22 of maps, page 51, Alameda County records; thence along said eastern line of Lot S, and its productions, to the center line of Harwood avenue; thence along the center line of Harwood avenue to the production of the eastern line of "Vernon Park," as said park is shown on a map thereof, recorded November 12, 1868, in book 34 of deeds, page 640, Alameda County records; thence along the production of and along said eastern line of "Vernon Park" to a point distant one hundred (100) feet northwesterly from the northwestern line of Shafter avenue; thence southwesterly parallel to the northwestern line of Shafter avenue to the production of the western line of the aforesaid lot 18 of Hillside Terrace; thence in a direct line to the point of beginning. Saving, excepting and excluding from the aforesaid district all public streets included and contained therein.

227 In this resolution whenever a distance from a line is given, the distance measured at right angles to such line is meant unless otherwise stated.

This city council hereby determines that serial bonds shall be issued to represent assessments of twenty-five dollars or over for the cost of said work and improvement; said serial bonds shall extend over a period ending five years from the second day of January next succeeding the date of said bonds, and an even annual proportion of the principal sum thereof shall be payable, by coupon, on the second day of January, every year after their date, until the whole is paid, and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year at a rate of seven per cent per annum on all sums unpaid, until the whole of said principal and interest are paid. Said bonds shall be issued in accordance with the provisions of an act of the legislature of the State of California, designated and referred to as the "Improvement act of 1911," and all acts amendatory thereof or supplementary thereto.

All of the aforesaid work and improvement shall be done in accordance with the provisions of the above named "Improvement act of 1911," and all acts amendatory thereof or supplementary

228 thereto; also in accordance with the plans and specifications made therefor by Perry F. Brown, superintendent of streets and ex-officio city engineer of said City of Oakland, and adopted by resolution No. 9396 N. S. of this council.

For further particulars, reference is hereby made to said resolution of intention number 9397 N. S., on file in the office of the city clerk of the City of Oakland.

PERRY F. BROWN,
Superintendent of Streets and ex-Officio City Engineer of the City of Oakland.

Oakland, California, December 21st, A. D. 1914.

Said last mentioned notice was headed "Notice of Improvement" in letters of more than one inch in length.

The foregoing consists of all the testimony taken, evidence introduced, objections made, and rulings and exceptions thereon in any way connected with or the subject of the specifications hereinafter set forth; that is, the specifications wherein the evidence is insufficient to sustain or justify the decision, specifications wherein the decision is insufficient and against the law and the specifications of errors in law occurring at the trial excepted to by the de-
229 fendants. Thereafter the court made and filed herein its findings of fact and conclusions of law.

Wherefore, plaintiffs, and each of them, now specify the following particulars wherein the evidence is insufficient to sustain or justify the decision and judgment:

1. The evidence is insufficient to justify or sustain the finding designated as section V.

2. The evidence is insufficient to justify or sustain the findings designated as section VI.

3. The evidence is insufficient to justify or sustain the finding designated as section VI-a.

4. The evidence is insufficient to justify or sustain the finding contained in section XVI thereof to the effect that the superintendent of streets assessed the sum of $27,978.68 upon the several pieces, parcels, lots or portions of lots and subdivisions of land in said district benefited thereby, to wit: upon each respectively in proportion to the estimated benefits to be received by each of said lots, portions of lots or subdivisions of land.

5. The evidence is insufficient to justify or sustain the finding contained in section XX thereof to the effect that by virtue of said
230 warrant defendant Marsh Bros. and Gardenier, Inc., its agents and assigns, were authorized to demand and receive the amount of the several assessments made to cover the sums due for the work specified in said contract and assessments.

6. The evidence is insufficient to justify or sustain the finding contained in section XXVI.

7. The evidence is insufficient to justify or sustain the finding contained in section XXIX.

8. The evidence is insufficient to justify or sustain the finding contained in that portion of section XXXV, to the effect that the improvement act of 1911, under which said proceedings for said street improvement were had and taken, does not provide or require that any bid or proposal made or filed under the provisions of said act for the construction of any street work or improvement should have thereon or therewith any affidavit whatever.

9. The evidence is insufficient to justify or sustain the finding contained in section XXXVI.

10. The evidence is insufficient to justify or sustain the finding contained in section XXXVII.

231 11. The evidence is insufficient to justify or sustain the finding contained in section XXXVIII.

12. The evidence is insufficient to justify or sustain the finding contained in section XXXIX.

13. The evidence is insufficient to justify or sustain the finding contained in section XLI.

14. The evidence is insufficient to justify or sustain the finding contained in section XLII.

15. The evidence is insufficient to justify or sustain the finding contained in section XLIII.

16. The evidence is insufficient to justify or sustain the finding contained in section XLIV.

17. The evidence is insufficient to justify or sustain the finding contained in section XLV.

18. The evidence is insufficient to justify or sustain the finding contained in section XLVI.

19. The evidence is insufficient to justify or sustain the finding contained in section XLIX.

232 Plaintiffs, and each of them, now specify the following particulars wherein the decision and judgment is against law, as follows:

1. Said decision and judgment is against law in finding and concluding that said new warrant, assessment and diagram will not constitute a cloud on the title of the land of the plaintiffs and that the same will constitute valid liens on said land.

2. Said decision and judgment is against law in finding and concluding that the improvement act of 1911, under which said proceedings for said street improvement were had and taken, does not provide or require that any bid or proposal made or filed under the provisions of said act for the construction of any street work or improvement should have thereon or therewith any affidavit whatever.

3. Said decision and judgment is against law in finding and concluding that the charter of the City of Oakland did not at any of the times mentioned in plaintiffs' complaint provide or require that the said bid of Marsh Bros. and Gardenier, Inc., should have thereon or therewith the affidavit mentioned in section 126 of article XIX of said charter, or any affidavit.

4. Said decision and judgment is against law in finding and concluding that it is not true that the result of any act or proceeding of the city council mentioned in plaintiffs' complaint was to deprive any of the plaintiffs of their property without due process of law or that any such act was in violation of the fourteenth amendment to the constitution of the United States.

5. Said decision and judgment is against law in finding and concluding that it is not true that ordinance No. 749 N. S. was or is void or that it contains or embraces more than one subject or that it is not confined to one subject or that it is in violation of the charter of the City of Oakland.

6. Said decision and judgment is against law in finding and concluding that in and by said ordinance No. 749 N. S. the council of the City of Oakland did fix and establish certain grades on Broadway street and Patton street.

7. Said decision and judgment is against law in finding and concluding that said assessment roll with said contractor's return constituted valid liens upon the real property within the assessment district therein described, and so continued to be until said council of said city by its resolution No. 11903 N. S. passed and adopted on the 28th day of December, 1915, set aside said assessment and ordered and directed the superintendent of streets of said city to make and issue to said defendant Marsh Bros., and Gardenier, Inc., a new warrant, assessment and diagram; and that said resolution No. 11903 N. S. was duly given and made by said council, and that said defendant Marsh Bros., and Gardenier, Inc., is entitled to have issued to it by said street superintendent of said city, a new warrant, assessment and diagram pursuant to and in accordance with said resolution No. 11903 N. S.

Now, therefore, plaintiffs present their engrossed bill of exceptions within the time allowed by law and the stipulation of counsel.

It is hereby stipulated that the foregoing bill of exceptions may be settled and allowed as the bill of exceptions herein.

Dated: April 17th, 1919.

C. IRVING WRIGHT,
L. D. MANNING,
F. E. BOLAND,
Attorneys for Plaintiffs.
JOHNSON & SHAW AND
R. M. F. SOTO,
Attorneys for Defendant Marsh Bros. & Gardenier, Inc.
H. L. HAGAN, *City Attorney;*
JOHN JEWETT EARLE,
Asst. City Atty.,
Attorneys for Defendants City of Oakland, Perry F. Brown, as Superintendent of Streets, and F. A. Cooley, as Treasurer of said City.

The foregoing bill of exceptions is hereby allowed, approved and settled this 30th day of April, A. D., 1919.

FRED V. WOOD,
Judge of the Superior Court.

(Endorsed:) Filed May 5, 1919, Geo. E. Gross, County Clerk, by W. E. Adams, Deputy.

236 [Title of Court and Cause.]

Stipulation.

It is hereby stipulated by and between the respective parties hereto that the demurrers heretofore interposed by the defendants, and the orders overruling the same, need not be considered nor printed in the transcript on appeal in the above entitled action.

Dated June 27th, 1919.

C. IRVING WRIGHT,
F. E. BOLAND,
JOHN DOUGLAS SHORT,
Attorneys for Plaintiff.
JOHNSON & SHAW,
Attorneys for Defendants Marsh Bros. and Gardenier, Inc.
R. M. F. SOTO,
Of Counsel;
H. L. HAGAN,
City Attorney,
Attorneys for Defendants City of Oakland, a Municipal Corporation; Perry F. Brown, as Superintendent of Streets of said City of Oakland, and F. A. Cooley, as Treasurer of said City.

(Endorsed:) Filed Aug. 14, 1919. Geo. E. Gross, County Clerk, by H. Hemmingsen, Deputy Clerk.

237 *Stipulation to Transcript.*

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct copies of all the papers therein set forth now on file in the office of the county clerk of the County of Alameda, State of California, that the minute orders therein contained are full, true and correct copies thereof as made and entered in the minutes of the Superior Court; that the said

foregoing papers shall constitute the transcript on appeal in this cause and that the appeal may be heard and determined thereon.

Dated, August 25th, 1919.

JOHNSON & SHAW,
R. M. F. SOTO,
Of Counsel,
Attorneys for Respondent Marsh Bros. & Gardenier, Inc.
H. L. HAGAN,
City Attorney;
JOHN JEWETT EARLE,
Asst. City Atty.,
Attorneys for Respondents City of Oakland, Perry F. Brown, as Superintendent of Streets, and F. A. Cooley, as Treasurer of said City.
C. IRVING WRIGHT,
L. D. MANNING,
F. E. BOLAND,
Attorneys for Appellants.

238 *Clerk's Certificate to Transcript.*

STATE OF CALIFORNIA,
County of Alameda, ss:

I, Geo. E. Gross, county clerk of the County of Alameda, State of California, and ex-officio clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in said action, now on file in my office, and with the orders therein made and entered on the minutes of said court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office and of the whole thereof.

I further certify that the erasures and interlineations appearing in the foregoing transcript were made before certifying thereto.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this — day of August, 1919.

[SEAL.]

GEO. E. GROSS,
Clerk,
By —— ——,
Deputy Clerk.

239 Due service and receipt of a copy of the within is hereby admitted this 25th day of August, 1919.

JOHNSON & SHAW,
R. M. F. SOTO,
Of Counsel;
Attorneys for Respondent Marsh Bros. & Gardenier, Inc.

H. L. HAGAN,
City Attorney;
JOHN JEWETT EARLE,
Assistant City Attorney,
Attorneys for Respondents City of Oakland, Perry F. Brown, as Superintendent of Streets, and F. A. Cooley, as Treasurer of said City.

240 District Court of Appeal of the State of California in and for the First Appellate District.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, J. B. Martin, Clerk of above entitled court, do hereby certify that the appeal in the case attached hereto, was taken to the Supreme Court of the State of California, that said Supreme Court on January 21st, 1921, transferred said case, being the case of Charles Butters, et al., Plaintiffs and Appellants vs. City of Oakland, et al., Defendants and Respondents, No. 3782 herein, to this, the District Court of Appeal of the State of California, in and for the First Appellate District, and that by virtue of said transfer, jurisdiction was thereby conferred upon this the said District Court of Appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in San Francisco, California, this 10th day of October, 1921.

[Seal of District Court of Appeal, State of California, First Appellate District.]

J. B. MARTIN,
Clerk District Court of Appeal, First Appellate District,
By WALTER S. CHISHOLM,
Deputy Clerk District Court of Appeal, State of California, in and for the First Appellate District.

241 First Appellate District, Division One, June 22, 1921.

Civil. No. 3782.

CHARLES BUTTERS et al., Plaintiffs and Appellants,

v.

CITY OF OAKLAND et al., Defendants and Respondents.

241*a* The plaintiffs in this action sought to enjoin the recordation of a certain assessment for street improvements in the city of Oakland done under the district plan provided for by the terms of "The Improvement Act of 1911." The same assessment was before the supreme court in the case of Rockridge Place v. City of Oakland, 178 Cal. 58, in which case the facts were quite fully stated and a number of the points discussed on this appeal were decided. It will be only necessary therefore to refer to such of the facts of the case as may be germane to the legal questions presented for the first time upon this appeal.

Somewhat more than one year prior to the adoption by the council of the city of Oakland of the resolution of intention by which the proceedings under review upon this appeal were initiated the said council adopted an ordinance under the so-called "Change of Grade Act" of 1909 (Stats. 1909, p. 1068), purporting to change certain grades on Broadway, which at the point along its route affected by the present proceeding was at that time unimproved in the sense that it had not previously been graded or paved. While this change of grade act of 1909 prescribes a detailed procedure for accomplishing the change or modification of the grades of public streets after notice and an opportunity to protest and have a hearing thereon upon the part of abutting owners, it contains no provision for the assessment or award of damages arising out of such change of grade; and this probably for the reason that the change or modification of the grade of the street affected thereby is merely a record or paper change out of which in itself no particular damage to abutting property owners could arise. The appellant herein, however, seems to complain that the council of Oakland saw fit to change the grade of Broadway, and then to cause the improvement of said street to be made to such changed grade under another and different act, viz., the Improvement Act of 1911.

[1] We fail to appreciate the force of this contention, since the change of grade of 1909 made no provision either for damages, or for the doing of improvement work upon streets, the grades of which had thus been changed of record. Whatever improvements were thereafter to be done upon such street must therefore necessarily be initiated and carried forward under some other street improvment act; and we can see no reason why the council was not at liberty to select the Improvement Act of 1911 as the act under which the improvement in question was to be accomplished, or wherein the plain-

tiffs had any ground of complaint at the action of the council in the selection of said act in making such street improvement.

241*b* The appellant, and in this same connection, urges that the ordinance of the council under which the change of grade of Broadway was accomplished was invalid for the reason that it embraced more than one subject in its title, contrary to the provisions of section 46, subdivision 4, of the Oakland charter.

[2] We do not find this objection to be well founded. The general subject of the ordinance in question was that of the change of grade of certain streets in the same neighborhood; and the fact that there were several of these streets affected by the proposed change of grade, or that in the course of making the change it became necessary incidentally to give the official name of Patton street to one of said streets, did not render the ordinance void as embracing more than one subject. It is a well established rule that the provisions of constitutions and laws relating to the subject matter and titles of acts should be construed liberally so as to permit of matters which are germane to the main purpose of the enactment to be included in it (36 Cyc., p. 1017; Cooley's Constitutional Limitations, 7 ed. p. 204).

[3] The next contention of the appellants is, that the contract for the street work in payment for which the assessment in question was levied, and about to be recorded, was void for the reason that the bid of the contractor was not accompanied by his affidavit, that his bid was genuine and not sham or collusive, required by the terms of section 126 of article 19 of the Oakland charter. This section of the charter, however, is a portion of the general article therein entitled "Public Work and Supplies," and is not a portion of those other parts or provisions in said charter having special reference to street work. When these are referred to they are found to contain the following provision: "Whenever in the judgment of the council the cost and expense of any of the foregoing (street improvements) should be paid by special assessment on private property, the general laws of the State of California in force at the time of the improvement shall govern and control, and all procedure shall be in conformity thereto." (Charter, subd. 46, sec. 15, art. 14.) The Street Improvement Act of 1911, expressly adopted by the Oakland council as the general law under which the improvement in question was to be made, does not contain any requirement as to a non-collusive affidavit on the part of the contractor; and we are of the opinion that the terms of said general law are controlling in the premises, and that the provision of said charter relied upon by the appellants does not apply to street work undertaken under this general law. The case of Barber v. Costa, 171 Cal. 132, cited by the appellants in support of their contention, shows when examined a material difference between the terms of the charter of San Jose and those of the charter of Oakland in respect to this particular matter, since by the terms of the former charter its provisions are expressly made controlling over the general law in case of a conflict between the two; while on the other hand the charter of Oakland gives the entire control over this class of street improvements to the general law. [4] In addi-

tion it may be said that even if it were to be conceded that the objection which the appellant now urges to the contractor's bid was originally a good and valid objection thereto, it was such an objection as would be waived by the property owner through his failure to avail himself of the provisions of section 16 of the Improvement Act in question by filing with the clerk of the council a notice in writing stating in what respect the acts and proceedings thus far taken were irregular, defective, erroneous or faulty. Having thus failed to avail himself of this special remedy the property owner cannot, after the contractor has expended his time and money in the improvement of the street in front of his property, be heard to complain of informalities in his bid for the work (Lent v. Tilson, 72 Cal. 405; Harney v. Benson, 113 Cal. 314, and O'Day v. Mitchell, 144 Cal. 374).

241c The next several contentions of the appellants have reference to questions which were considered and decided adversely to the appellants' position in the case of Rock Ridge Place v. City of Oakland, supra, and hence a restatement or reconsideration of those matters is deemed unnecessary.

The case of Spring Street Co. v. City of Los Angeles, 170 Cal. 24, relied upon by the appellants as supporting their contention that the assessment was void because this property was not shown to have been benefited, has been distinguished from cases identical with the case at bar by both the supreme and appellate tribunals, the basis of distinction being that that case was a proceeding in eminent domain, while these are street assessment cases (Cutting v. Vaughn, 59 Cal. Dec. 130; Hutchison v. Coughlin Co., 29 Cal. App. Dec. 556). We think the distinction therein drawn has application to the facts of the case at bar.

Judgment affirmed.

RICHARDS, *J.*

We concur:

WASTE, *P. J.*

KERRIGAN, *J.*

242 By the COURT:

The petition for a rehearing in this court is denied. The record indicates that the City of Oakland, after establishing the official grade of the street and without instituting any proceeding to ascertain and provide for the payment of the damages caused by the raising or lowering of the level of the street by the change of grade, proceeded to improve the street under the Street Improvement Act of 1911, and reduced it to the official grade. The effect would be, if nothing further occurred, that the change of grade would actually take place without previous compensation to the owners for the damages caused thereby, if any. If this closed the case so far as the right to damages was concerned we do not think the principles of justice would allow such a proceeding without the test of an examination in the courts. [1] But the remedy of the property owners in such a case is not to enjoin the collection of the assessment levied to pay the cost of the work, but to enjoin the performance of the contract

prior to the work having been done until damages are paid, in case the result of such work would cause damage to the abutting property. It constitutes no defense against the collection of the assessment. That the city is liable for damage caused to the abutting property by excavation or fills in a street in front thereof, see Eachus v. Los Angeles, 130 Cal. 493; Eachus v. Los Angeles etc. Co., 103 Cal. 614; Reardon v. San Francisco, 66 Cal. 506.

(All concur, excepting Angellotti, C. J., absent.)

243 Original.

In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation; PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

Petition for Writ of Error and for Order Fixing Bond.

To the Honorable W. H. Waste, Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One:

Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, your petitioners and plaintiffs in error respectfully represent as follows:

I.

That on or about the 22nd day of June, 1921, the District Court of Appeal of the State of California, First Appellate District, Division One, rendered an opinion herein, in which opinion the court affirmed a judgment which had theretofore been made by the Superior Court of the State of California, in and for the County of Alameda,
244 refusing to enjoin the recordation of an assessment for street work in the action entitled, "In the Superior Court of the State of California, in and for the County of Alameda, No. 47,887, Department No. 1, Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald,

Plaintiffs, vs. City of Oakland, a municipal corporation, Perry F. Brown, as Superintendent of Streets of said City of Oakland, F. A. Cooley, as Treasurer of said City Marsh Bros. and Gardenier, Inc., a corporation, Defendants."

II.

That thereafter, and at the expiration of thirty days from said June 22, 1921, said Court rendered judgment in accordance with said opinion, and said judgment thereupon became final.

III.

That an application was then made to the Supreme Court of the State of California to review said opinion and judgment, which application was on the 19th day of August, 1921, denied by said last named court. That said opinion and judgment in said matter are now filed and are now rendered and decided in the highest court of said State of California in which a decision in said action could be drawn.

IV.

That in said judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of your petitioners, all of which will more in detail appear from the Assignment of Errors which is filed with this petition and made a part thereof.

V.

That as appears in the records and proceedings in said Court there was drawn in question in said action, the validity of
245 a statute of the State of California, to-wit: an act of the legislature of the State of California, entitled:

"An act to provide for work in and upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities, and upon property and rights of way owned by municipalities, and for establishing and changing the grades of any such streets, avenues, lanes, alleys, courts, places and sidewalks, and providing for the issuance and payment of street improvement bonds to represent certain assessments for the cost thereof and providing a method for the payment of such bonds."

(Approved April 7, 1911.)

And an authority exercised under said statute on the ground that they violated Article 14 of the Amendments to the Constitution of the United States, and the decision of said Court in said action was in favor of the validity of said statute and of the authority so exercised.

VI.

That as further apears in the said records and proceedings, certain rights, privileges, and immunities were claimed by your petitioners under Article 14 of the Amendments to the Constitution of the United States, and the decision of said Court was against the rights, privileges and immunities so claimed.

Wherefore, your petitioners and plaintiffs in error pray that a writ of error be allowed, returnable into the Supreme Court of the United States of America, and for the issuance of a citation to the above named defendants in error, and that a transcript of the records, proceedings and papers upon which said judgment was rendered duly authenticated, be sent to the Supreme Court of the United States in compliance with the rules of said Court in such cases made and provided and that upon the giving of a bond in an amount to be determined by this Court, all further proceedings upon said judgment be stayed until the determination of this cause by said, The Supreme Court of the United States.

246 & 247 And your petitioners will ever pray.

C. IRVING WRIGHT,
F. E. BOLAND,
L. D. MANNING,
KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,
Attorneys for Petitioners and Plaintiffs in Error.

Presented to and received by me this 28th day of September, 1921.

WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One.

248 [Endorsed:] Original. No. 3782. In the District Court of Appeal of the State of California, First Appellate District, Division One. Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error, vs. City of Oakland, a municipal corporation, Perry F. Brown, as Superintendent of Streets of said City of Oakland, F. A. Cooley, as Treasurer of said City, March Bros. and Gardenier, Inc., a corporation, Defendants in Error. Filed Sep. 30, 1921. J. B. Martin Clerk. By Walter S. Chisholm. Petition for Writ of Error and for Order Fixing Supersedeas bond. Knight, Boland, Hutchinson & Christin, Counselors at Law, Balfour Building, San Francisco, Attorneys for Petitioners.

249 Original.

In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, Rockridge Place Company, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation; PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

Assignments of Error.

Now come Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error in the above entitled cause, and complain of certain errors in the proceedings herein committed to the prejudice of your petitioners by the District Court of Appeal, State of California, First Appellate District, Division One, and in the judgment rendered, made and entered herein by said Court thirty days after the 22nd of June, 1921, and assign the following as the errors complained of:

I.

Said Court erred in its opinion in said cause and in the judgment rendered therein affirming the judgment of the Superior Court of the State of California, in and for the County of Alameda.

II.

Said Court erred in its opinion and judgment in said cause that the "Improvement Act of 1911," being an act so entitled of
250 the Legislature of the State of California, approved 7th April, 1911, was valid and not in violation of Article 14 of Amendments to the Constitution of the United States, and that your petitioners are not thereby deprived of their property without due process of law, nor denied thereby the equal protection of the laws, in the following respects:

(*a*) That there is no provision for a prior estimate of the cost of the work provided to be done;

(*b*) That there is no provision for the prior measure of the quantum of benefit to the petitioners' property in proportion to the cost of the work;

(*c*) That the total cost of the work may exceed the total benefit;

(*d*) That there is no provision for the off-setting of damages against benefits.

III.

Said Court erred in its opinion and judgment that the proceedings had and taken under the provisions of said "Improvement Act of 1911," being an act so entitled of the Legislature of the State of California, approved 7th April, 1911, to wit, the improvement of Broadway under Resolution of Intention No. 9397, was valid and not in violation of Article 14 of Amendments to the Constitution of the United States, and that your petitioners are not thereby deprived of their property without due process of law, nor denied thereby the equal protection of the laws, in the following respects:

(*a*) That there was no prior estimate of the cost of the work provided to be done;

(*b*) That there was no estimate of the quantum of benefit to the petitioners' property in proportion to the cost of the work.

(*c*) That said proceedings were so had and taken that the damages to petitioners' property could not be off-set against the benefits accruing thereto.

IV.

Said Court erred in its opinion and judgment in said cause that the City Council of the City of Oakland might change the grade of Broadway between Ocean View Drive and Keith Avenue
251 & 252 under the provision of the "Change of Grade Act of 1909," being an act of the Legislature of the State of California so entitled, approved 21st April, 1909, and thereafter might do the work constituting the change of grade under the provision of said "Improvement Act of 1911," being an act so entitled of the Legislature of the State of California, approved 7th April, 1911, although the result thereof was to deprive the petitioners of their property without due process of law, in violation of Article 14 of Amendments to the Constitution of the United States.

For which errors said Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, petitioners and plaintiffs in error herein, pray that the judgment of said District Court of Appeal of the State of Calfornia, First Appellate District, Division One, be reversed and that the judgment be entered for said petitioners and plaintiffs in error herein, and for their costs.

C. IRVING WRIGHT,
F. ELDRED BOLAND,
L. D. MANNING,
KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,
Attorneys for Petitioners and Plaintiffs in Error.

Presented to me and received by me this 28th day of September, 1921.

WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One.

253 [Endorsed:] Original. No. 3782. In the District Court of the State of California, First Appellate District, Division One. Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error, vs. City of Oakland, a municipal corporation, Perry F. Brown as Superintendent of Streets of said City of Oakland, F. A. Cooley, as Treasurer of said City, Marsh Bros. and Gardenier, Inc., a corporation, Defendants in Error. Assignments of Error. Filed Sep. 30, 1921. J. B. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk. Knight, Boland, Hutchinson & Christin, Counselors at Law, Balfour Building, San Francisco, Attorneys for Petitioners and Plaintiffs in Error.

254 Original.

In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation; PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

Order Allowing Writ of Error and Fixing Cost Bond.

Upon the filing of the petition of the above named persons, Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, for a Writ of Error, together with their Assignment of Errors, and upon motion of counsel for plaintiffs in error,

It is ordered that a Writ of Error, as prayed for in said petition, be, and it is hereby allowed to said plaintiffs in error, Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation,

Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, to have reviewed by the Supreme Court of the United States the judgment heretofore entered in the above entitled cause.

255 It is further ordered that the amount of the bond to be filed in this Court by said plaintiffs in error in connection with the Writ of Error prayed for be, and it is, hereby fixed in the sum of Five hundred Dollars, and that upon the filing and approval of said bond in said amount, all further proceedings in said cause in said District Court of Appeal of the State of California, First Appellate District, Division One, shall be suspended and stayed until the determination of such Writ of Error by the Supreme Court of the United States.

Dated: September 28th, 1921.

WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeals of the State of California, First Appellate District, Division One.

256 [Endorsed:] Original. No. 3782. In the District Court of the State of California, First Appellate District, Division One. Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error, vs. City of Oakland, a municipal corporation, Perry F. Brown, as Superintendent of Streets of said City of Oakland, F. A. Cooley, as Treasurer of said City, Marsh Bros. and Gardenier, Inc., a corporation, Defendants in Error. Order allowing writ of error and fixing supersedeas and cost bond. Filed Sept. 30, 1921. J. B. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk. Knight, Boland, Hutchinson & Christin, Counselors at Law, Balfour Building, San Francisco, Attorneys for Plaintiffs in Error.

257 Copy.

In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation; PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

Cost Bond on Writ of Error.

Know all men by these presents:

The undersigned, American Indemnity Company, a corporation duly organized and existing under and by virtue of the laws of the State of Texas, and licensed to do a general surety business in the State of California, is held and firmly bound unto the defendants in error above named, in the sum of Five Hundred Dollars ($500.00), to be paid unto the said defendants in error or their successors and assigns for the payment of which sum well and truly to be made the undersigned, hereby binds itself by these presents.

Whereas, Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, plaintiffs in error above named have sued out a writ of error to the Supreme Court of the United States of America to reverse the
258 & 259 judgment in the above entitled cause, rendered by the the District Court of Appeal of the State of California, First Appellate District, Division One, and

Whereas, said plaintiffs in error desire, during the writ of error, to stay the execution of said judgment of the District Court of Appeal of the State of California, First Appellate District, Division One.

Now therefore, the condition of this obligation is such that if Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, plaintiffs in error above named, shall prosecute said writ of error to effect and pay all costs and damages which may be awarded against them as such, plaintiffs in error, if they fail to make good their plea and shall abide by and perform whatever order or decree may be rendered against them in this cause of the Supreme Court of the United States, or on the mandate of said Court by the said District Court of Appeal of the State of California, First Appellate District, Division One, then this obligation to be void, otherwise to be and remain in full force and effect.

In testimony whereof, the said Surety has caused its corporate name and seal to be hereunto affixed by duly authorized attorney in fact at San Francisco, California, on the 28th day of September, 1921.

AMERICAN INDEMNITY COMPANY, [SEAL.]
By THEODORE P. STRONG, *Attorney in Fact.*

The foregoing bond is hereby allowed and approved this 28th day of September, 1921, the same to operate as a cost bond in said cause pending the prosecution of said writ of error.

WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeals of the State of California, First Appellate District, Division One.

260 [Endorsed:] Copy. No. 3782. In the District Court of Appeal of the State of California, First Appellate District, Division One. Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error, vs. City of Oakland, a municipal corporation, Perry F. Brown, Superintendent of Streets of said City of Oakand, F. A. Cooley, as Treasurer of said City, Marsh Bros. and Gardenier, Incs., a corporation, Defendants in Error. Cost Bond on Writ of Error. Filed Sep. 30, 1921. J. B. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk. Knight, Boland, Hutchinson & Christin, Counselors at Law, Balfour Building, San Francisco, Attorneys for Plaintiffs in Error.

261 Original.

In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation, PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the the Justices of the District Court of Appeal of the State of California, First Appellate District, Division One, Greeting:

Because in the records and proceedings, as also in the rendition of the Judgment of a plea which is in said District Court of Appeal of the State of California, First Appellate District, Division One, before you, or some of your, being the highest Court of law or equity of the said State in which a decision could be had in that certain matter entitled: "In the District Court of Appeal, State of California, First Appellate District, Division One, No. 3782, Charles Butter, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock
262 Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Plaintiffs and Appellants, vs. City of Oakland, a municipal corporation, Perry F. Brown, as Superintendent of Streets of said City of Oakland, F. A. Cooley, as

Treasurer of said City, Marsh Bros. and Gardenier, Inc., a corporation, Defendants and Respondents, wherein was drawn in question the validity of a statute, or an authority exercised under said statute, to-wit, a Statute of the State of California, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity, a manifest error hath happened to the great damage of the said petitioners and plaintiffs in error, Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, as by their petition appears, we being willing that error, if any hath been, should be corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be given therein, that, under your seal, distinctly and openly, you send the records and proceedings with all things concerning the same to the Supreme Court of the United States of America, together with this Writ, so that you have the same at Washington, District of Columbia, on the 29th day of October, 1921, in the said Supreme Court of the United States, to be then and there held; that the records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 29th day of September, 1921.

Done in the City and County of San Francisco, State of California, with the seal of the Southern Division of the United
263 & 264 States District Court of the United States for the Northern District of California attached.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the Southern Division of the United States District Court for the Northern District of California,
By J. A. SCHAERTZER,
Deputy Clerk.

Allowed this 28th day of September, 1921.

WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One.

265 [Endorsed:] Original. No. 3782. In the District Court of Appeal of the State of California, First Appellate District, Division One. Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation Amelia J. Brockelhurst, Gus Brause, Mary A. MacDonald, Petitioners

and Plaintiffs in Error, vs. City of Oakland, a municipal corporation, Perry F. Brown, as Superintendent of Streets of said City of Oakland, F. A. Cooley, as Treasurer of said City, Marsh Bros. and Gardenier, Inc., a corporation, Defendants in Error. Writ of Error. Filed Sep. 30, 1921. J. B. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk. Knight, Boland, Hutchinson & Christin, Counselors at Law, Balfour Building, San Francisco, Attorneys for Plaintiffs in Error.

266 District Court of Appeal of the State of California in and for the First Appellate District.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, J. B. Martin, Clerk of above-entitled court do hereby certify that there was lodged with me as such Clerk on September 30th, 1921, in the matter of Butters, et al. Petitioners and Plaintiffs in error vs. City of Oakland, etc. et al., Defendants in Error, No. 3782 herein,

1. The original bond of which a copy is herein set forth.

2. Copies of the writ of error, as herein set forth, for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in San Francisco, California, this 10th day of October, 1921.

[Seal of the District Court of Appeal, State of California.]

J. B. MARTIN,
Clerk District Court of Appeal,
By WALTER S. CHISHOLM,
Deputy Clerk District Court of Appeal, State of California, in and for the First Appellate District.

267 In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE, COMPANY, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation; PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

Citation.

The President of the United States of America to City of Oakland, a municipal corporation; Perry F. Brown, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a corporation, Defendants in Error in the above entitled cause:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of California, wherein Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, are petitioners and plaintiffs in error, and you are the defendants in error, to show cause,
268 & 269 if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness the Presiding Justice of the District Court of Appeals of the State of California, First Appellate District, Division One, this 30th day of September, 1921.

WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeal of the State of California, Division One.

Attest:

[Seal of District Court of Appeal, State of California.]

J. B. MARTIN,
Clerk of the District Court of Appeal of the State of California.

270 [Endorsed:] Original. No. 3782. In the District Court of Appeal of the State of California, First Appellate District Division One. Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error, vs. City of Oakland, a municipal corporation, Perry F. Brown, as Superintendent of Streets of said City of Oakland, F. A. Cooley, as Treasurer of said City, Marsh Bros. and Gardenier, Inc., a corporation, Defendants in Error. Citation. Filed Oct. 6, 1921. J. B. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk. Knight, Boland, Hutchinson & Christin, Counselors at Law, Balfour Building, San Francisco, Attorneys for Plaintiffs in Error.

Due service and receipt of a copy of the within Citation is hereby admitted this 3rd day of October, 1921.

JOHNSON & SHAW,
R. M. F. SOTO,
Attorneys for Marsh Bros. & Gardenier, Inc., Defendants in Error.
LEON E. GRAY,
City Attorney, City of Oakland;
____ ____,
Assistant City Attorney, City of Oakland, Attorneys for City of Oakland, Perry F. Brown, as Superintendent of Streets, and F. A. Cooley, as Treasurer of said City, Defendants in Error.

271 In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE, Company, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation; PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City; Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

It is hereby stipulated and agreed that the return to the Writ of Error and the Transcript for use before the Supreme Court of the United States in the above entitled cause may consist of the following papers or records and none other, and that the cause may be heard upon such papers and records:

(1) Certificate of the Clerk regarding jurisdiction.

(2) Transcript.

(3) Opinion.

(4) Order by the Supreme Court of the State of California denying a hearing of the cause.

(5) Petition for Writ of Error.

(6) Assignment of Errors.

(7) Order allowing a Writ of Error and Fixing Bond.

(8) Bond.

(9) Writ *or* Error.

(10) Certificate of Filing and Writ *or* Error.

(11) Citation.

(12) Stipulation as to Record.

(13) Clerk's Certificate and return to Writ of Error.

JOHNSON & SHAW,
R. M. F. SOTO,
Attorneys for Marsh Bros. & Gardenier, Inc., Defendants in Error.

272 & 273 LEON E. GRAY,
City Attorney, City of Oakland;
____ ____,
Assistant City Attorney, City of Oakland, Attorneys for City of Oakland, Perry F. Brown, as Superintendent of Streets, and F. A. Cooley, as Treasurer of said City, Defendants in Error.

C. IRVING WRIGHT,
F. ELDRED BOLAND,
L. D. MANNING,
KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,
Attorneys for Petitioners and Plaintiffs in Error.

274 [Endorsed:] Original. In the District Court of Appeal of the State of California, First Appellate District, Division One. Charles Butters, et al., Petitioners and Plaintiffs in Error, vs. City of Oakland, et al., Defendants in Error. Filed Oct. 6, 1921. J. B. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk. Stipulation as to Record on Writ of Error. Knight, Boland, Hutchinson & Christin, Counselors at Law, Balfour Building, San Francisco, Attorneys for Petitioners and Plaintiffs in Error.

275 In the District Court of Appeal of the State of California, First Appellate District, Division One.

No. 3782.

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE, COMPANY, a Corporation; Berkeley Rock Company, a Corporation; Amelia J. Brocklehurst, Gus Brause, Mary A. MacDonald, Petitioners and Plaintiffs in Error,

vs.

CITY OF OAKLAND, a Municipal Corporation; PERRY F. BROWN, as Superintendent of Streets of said City of Oakland; F. A. Cooley, as Treasurer of said City, Marsh Bros. and Gardenier, Inc., a Corporation, Defendants in Error.

I, J. B. Martin, Clerk of the District Court of Appeal of the State of California, First Appellate District, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify that the foregoing pages contain and are originals or copies of papers filed and proceedings had in said court, in that certain cause wherein Charles Butters, Edith F. Wright, Rockridge Place Company, a corporation, Berkeley Rock Company, a corporation, Amelia J. Brocklehurst, Gus Brause, and Mary A. MacDonald are the Plaintiffs in Error, and City of Oakland, a municipal corporation, Perry F. Brown, as Superintendent of Streets of said City of Oakland, F. A. Cooley, as Treasurer of said City, Marsh Bros. and Gardenier, Inc., a corporation are the Defendants in Error, as follows to wit:

(1) Certificate of the Clerk regarding jurisdiction.

(2) Transcript.

(3) Opinion.

(4) Order by the Supreme Court of the State of California denying a hearing of the cause.

276 (5) Petition for Writ of Error.

(6) Assignment of Errors.

(7) Order Allowing a Writ of Error and Fixing Bond.

(8) Bond.

(9) Writ *or* Error.

(10) Certificate of Filing Bond and Writ of Error.

(11) Citation.

(12) Stipulation as to Record.

(13) Clerk's Certificate and return to Writ of Error.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the City and County of San Francisco, State of California, this 10th day of October, 1921.

[Seal District Court of Appeal, State of California, First Appellate District.]

J. B. MARTIN,
Clerk of the District Court of Appeal of the State of California, First Appellate District, Division One,
By WALTER S. CHISHOLM,
Deputy Clerk District Court of Appeal, State of California, in and for the First Appellate District.

Endorsed on cover: File No. 28,578. California District Court of Appeal, First Appellate District. Term No. 623. Charles Butters, Edith F. Wright, Rockridge Place Company, et al., plaintiffs in error, vs. City of Oakland, Perry F. Brown, as superintendent of streets, F. A. Cooley as treasurer, &c., et al. Filed November 21st, 1921. File No. 28,578.

Subject Index

Table of Citations

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. 210

CHAS. BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY et al.,
Plaintiffs in Error,

vs.

CITY OF OAKLAND, PERRY F. BROWN, as Superintendent of Streets; F. A. COOLEY, as Treasurer, etc., et al.,

In Error to the District Court of Appeal of the State of California, in and for the First Appellate District.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Facts.

In this action plaintiffs in error (plaintiffs and appellants below) seek to enjoin the recordation of an assessment for street improvement work in Oakland and the issuance of bonds covering the

assessment. The work culminating in the assessment complained of was done under the forms of Part I of the "Improvement Act of 1911" (Calif. Stats. 1911, p. 730). This work consisted in a great change and lowering of the grade on Broadway in the City of Oakland, in an ordinary grading of Patton Street and in the construction of culverts, conduits, inlets and manholes, as shown in the Resolution of Intention (tr. pp. 67-73, fols. 148-161). The plan of the streets so graded is marked 161b and is set out in the transcript opposite page 72. A profile of the excavating is shown on plan 191½ opposite page 90 of the transcript. Broadway is 100 feet, Patton Street 60 feet in width (plan 161b *supra*). The length of the work on Broadway was 1324 feet, in round numbers; on Patton Street 396½ feet (tr. p. 89, fol. 190). The maximum cut on Broadway was about 33½ feet (tr. p. 90, fol. 191). The total estimated amount of excavation in the cut on Broadway was 34,623 cubic yards (tr. p. 73, fol. 160). This was the amount bid upon and paid for, the total cost of all the work including supervision being $27,978.68 (tr. p. 46, fol. 106).

Under the forms of Part I of the "Improvement Act of 1911" *supra,* a district was delimited by the Council to bear the total expense of the work; this district adjoins the southerly boundary line of the City of Berkeley (tr. p. 41, fol. 96), and the land included in the district is outlying suburban property in the foothill country (tr. p. 94, fol. 200). The various properties within the district are,

naturally, located with extreme diversity as regards the improvement, and are extremely diverse with respect to the relation between their respective areas and their frontage on the streets having access to the improvement, and also with respect to the effect that the excavation would have upon them by way of benefit or damage. It will be noted that the district delimited by the Council has its exterior boundary lines in large part running along the center lines of streets and highways (tr. pp. 41-42, fols. 94-98). It will be noted that the access from the various properties within the district to the streets graded, viz., Broadway and Patton Street, is precisely the same as the access thereto of all the properties not within the district but on the streets through the center lines of which the exterior boundaries of the district run (as illustration, see plan 161b opposite, tr. p. 72). The exterior boundary line of the district runs along the center line of Ocean View Drive shown on this plan. It is clear that the property on the southern side of Ocean View Drive, which is not in the district and not assessed, has the same access to the improvement as the property on the northern side of Ocean View Drive which is within the district and is assessed (see also plan 147½ opposite tr. p. 66).

Two pieces of land are shown by the record to have been peculiarly damaged by the excavation, viz., lots 49 and 50, as designated in the Table of

Assessments (tr. p. 80). These lots were left high in the air without access to Broadway, the cut opposite lot 49 reaching a maximum of 33½ feet, and the cut opposite lot 50 a maximum of 32 feet (tr. p. 90, fols. 191-92). The undisputed testimony is that lot number 49 had lost, by reason of the excavation, all its value so far as the Broadway frontage is concerned (tr. p. 103, fol. 219), yet it was assessed for the work that destroyed it $663.27 (tr. p. 80), almost all of this assessment being at the rate of $3.00 per front foot, because it fronted on the work (tr. p. 95, fol. 203), while a very small amount of the assessment was computed on area to take care of a deduction of fifty cents per front foot deducted by the Council, on appeal, from the assessment on the property fronting on Chabot Road and imposed by the Council on all the property within the district in proportion to the number of square feet of each parcel (tr. p. 98, fols. 208-10).

Lot number 50, according to one of the witnesses, would be useless for residence purposes without a great deal of money spent on it: before the work it had a value, for Broadway frontage, of something like $3100 (tr. p. 102, fol. 218). According to another witness, by reason of the work, from the residential point of view and without consideration of any special damage to the reservoir upon it, it had decreased in value $2087.50 (tr. pp. 101-2, fols. 216-17). The reservoir upon lot number 50 prior to

the work was worth $2000 and by the work the value of the reservoir had been absolutely destroyed (tr. p. 100, fol. 214). Another witness testified that lot number 50, by reason of the work, had lost about 85 per cent of its value (tr. p. 103, fol. 85). This was caused by loss of access (tr. p. 101, fol. 216). The evidence of these witnesses is undisputed. The result is that lot number 50 had a value prior to the work of something like $3100 as a lot of land fronting on Broadway, and that on it was a reservoir of an additional value of $2000; that the value of the reservoir had been completely destroyed; that of the $3100 remaining value, 85 per cent had, according to one witness, been destroyed by the work, viz., a loss of $2635, leaving a total salvage of only $465. On the other hand, the testimony of the witness Reed, who testified to a loss of $2087.50, would leave $1012.50 as the total salvage. Yet lot number 50 was assessed for $1205.27 (tr. p. 80), the greater part being for frontage on Broadway, a comparatively small amount being due to the distribution of the Chabot Road deduction; and $45.46 was assessed by reason of its frontage on Ocean View Drive (tr. p. 96, fol. 204).

The method of computing the assessments in the district was substantially as follows:

Four classes of property in the district, viz., property having a direct frontage on Broadway; property having a direct frontage on Fifty-ninth Street;

property fronting on Keith Avenue; and property fronting on Patton Street, were deemed to be peculiarly and primarily benefited by the improvement and had placed upon them an assessment based upon their frontage on those respective streets. Of these primary benefits, the property fronting on Broadway was deemed to have been benefited in the highest degree (tr. p. 93, fols. 198-9). A sum per front foot was fixed upon in estimating these primary benefits. It does not appear what that sum was for frontage on Fifty-ninth Street, Keith Avenue or Patton Street, but it does appear that property fronting on the work on Broadway was assessed at the highest rate, viz., $3.00 per front foot (tr. p. 93, fol. 199).

There were twelve classes of benefits estimated in the district (tr. p. 96, fol. 206). Apart from the estimation of primary benefits above mentioned, the district was divided into zones for the estimation of secondary benefits. The zone least benefited was designated B, lying on a steep, inaccessible hillside not readily usable for subdivision purposes. This zone, estimated to receive the smallest benefit, was taken as the basis for calculating the benefits received by the other zones A, C, D and E and their benefits ran in the ratios of 1, 2, 3, 6, 9, 12 and so on. These were the so-called secondary benefits and, with respect to them, the assessment was based upon area. Some of the properties that were assessed for secondary benefits were also assessed for pri-

mary benefits, having frontage on streets contiguous to Broadway or streets that the grading of Broadway would put in a better line of communication. The primary benefits were based upon frontage. The primary benefits were arbitrarily fixed in the first instance and many calculations were made to proportion the benefits as between the secondary and primary (tr. p. 93-5, fols. 197-203). The final result of the calculations was that property on Broadway was assessed at the rate of $3.00 per front foot, in addition to any secondary benefits for which it may have been assessed, by reason of frontage on other streets, and in addition to the reassessment by area of the amount of the deduction from the property on Chabot Road as determined by the Council on appeal.

The proceedings were had under Part I of the above mentioned Improvement Act of 1911, which does not provide for any consideration or ascertainment of damages, for the reason that it seems to contemplate only the ordinary grading and improvement of streets. Part II of the same Act, which expressly applies to changes of grade, in common with several other statutes expressly providing for changes of grade, makes definite provision for the consideration, ascertainment and payment of damages.

Plaintiffs Rockridge Place Co. and Wright have recently succeeded, through action culminating in the highest courts, in obtaining judgments against

the City of Oakland for the damage sustained by their respective properties, as above mentioned, owing to the deprivation of their access to the street.

Rockridge Place Co. v. City of Oakland, 41 Cal. App. Dec. 42;

Wright v. City of Oakland, 41 Cal. App. Dec. 45.

In the Rockridge Place Co. case plaintiff recovered $750. In the Wright case, plaintiff recovered $2000. The effect of the assessment now under consideration is that the City of Oakland is attempting to take away with its left hand the "just compensation" it is required to give with its right.

HISTORY OF LITIGATION IN CALIFORNIA CONCERNING THIS ASSESSMENT.

The opinion of the District Court of Appeal states that this

> "same assessment was before the Supreme Court in the case of *Rockridge Place v. City of Oakland,* 178 Cal. 58, in which case the facts were quite fully stated and a number of the points discussed on this appeal were decided" (tr. p. 113, fol. 241a).

In that case a proceeding in certiorari had been brought in the District Court of Appeal to review the heretofore mentioned resolution of the City Council of the City of Oakland directing a reassess-

ment. Judgment was given by the District Court of Appeal annulling the resolution.

Rockridge Place Co. v. City Council of the City of Oakland, et al. 24 Cal. App. Dec. 387.

Said that Court:

"The particular point made by the petitioner herein is that in making such reassessment and reapportionment of the burden to be laid upon the numerous lots within said district and affected by said improvement, the city council did not take into consideration the proportion of benefits derived or to be derived by each of said several lots by virtue of said improvement, and did not make said reassessment, in accordance with or in proportion to such benefits, according to the requirements of said improvement act; but on the contrary, and by the resolution assailed in this proceeding, ordered and directed said reassessment to be made in proportion to the area of the various lots and parcels of land affected thereby. In their return to this writ the respondents have presented to this court the various resolutions and orders of the city council of Oakland in relation to the original assessment of the property within the limits of said district, showing in detail the area and amount of assessment originally imposed upon each of said lots, and has also presented the official plat or diagram of said district showing that the lots embraced therein are of different shapes and areas, and are located at differing distances from and in divergent relation to the street sought to be improved therein; and has also presented to this court the detail of the attempted reapportionment of the burden to be imposed upon each of said lots. A comparison of the original as-

sessment of these several lots with the reassessment of the same made in accordance with the order of the council sought to be annulled herein, demonstrates that such reassessment has been made in proportion to the areas of the several lots affected thereby, and not in proportion to the benefits that each would derive from the making of the improvement in question. This is the only conclusion which can be arrived at from the record as presented to this court. The respondents in their return to this writ have not seen fit to present to this court any sufficient showing that there was any oral evidence presented before the city council at the time such reassessment was made from which a different conclusion could be drawn than that which appears inevitable from a comparison of the original assessment of these lots with the reassessment thereof. Upon the oral argument it appeared that no record was made or kept of any such evidence. The clerk certifying the record states in his return that he has no recollection of the substance or effect of any such evidence if the same was taken; and there is nothing before us to show that if any such oral evidence was taken or could be produced it would change the substance and effect of what the record already discloses. And this being so this court must assume that no such evidence was in fact presented. On the face of the record, therefore, there appears to have been a plain violation of the provisions of the Improvement Act of 1911, which required the reassessment of these lots to be made in proportion to benefits rather than in proportion to area of the respective lots upon which its burdens were to be imposed. It follows necessarily that the resolution in question being in violation of the statute was in excess of the jurisdiction of the city council, and must for that reason be annulled."

Thereafter the Supreme Court of California vacated the decision and judgment of the District Court of Appeal and granted a hearing of the case. With respect to the sole point which, in disposing of the case, the District Court of Appeal found necessary to decide, the Supreme Court of California held that even assuming that the record showed by a mathematical computation that the effect of the reassessment was a deduction of fifty cents per running foot on all the lots on Chabot Road, in the aggregate $4462.03, and the distribution of this sum over the whole district in proportion to the area of the various parcels of land in the district, it could not be said to show an arbitrary distribution or a distribution not in accordance with the rule of the statute. Such a mathematical showing, it seems, might be deemed a mere coincidence.

> "For," said the Court, "those facts are entirely consistent with the conclusion that it was correctly decided by the council that, in order to make the assessment one according to the benefit of the several lots, it was necessary to charge against each lot the exact amount specified in the resolution. That the amounts so charged are, in so far as the $4462.03 is concerned, the same as would have been obtained by the method which counsel contends was in fact adopted, but as to the adoption of which there is no showing in the record other than that they are the same, is entirely beside the question. It certainly cannot be held upon the record before us that under no conceivable conditions could the several lots be benefited

in the proportion stated by the assessment, or that the assessment is void on its face" (178 Cal. 58).

Having the whole case before it, the Supreme Court of California proceeded to consider one other of the several questions presented by the plaintiff involving the Fourteenth Amendment, saying:

"A question is raised as to the constitutionality of the Improvement Act of 1911, the claim being that it does not provide for an assessment of the lands in the district in accordance with the benefits to be actually received by such lands from the work, but only provides for an assessment in proportion to the estimated benefits. The act provides (sec. 4) that the City Council may make the expense of the work chargeable upon a district, which, in its resolution of intention, it shall declare 'to be the district benefited by said work and improvement', etc., and (sec. 20) that it shall assess the cost of the work upon the several lots in the assessment district benefited thereby, 'upon each respectively, in proportion to the estimated benefits to be received by each of said several lots', etc. Full opportunity is required to be given to the property owners to be heard with respect to the proposed work and the extent of the district, prior to any order for the doing of the work, and after the assessment is made they have the opportunity to be heard as to the amounts charged against their respective lots. It is apparent, of course, that if the district created by the City Council comprises all the land to be actually benefited by the proposed work, which is the manifest design of the act, and if this 'benefit' to the land embraced in the district exceeds the cost of the work, an assessment of the cost upon the several lots in the

district 'upon each respectively in proportion to the estimated benefits', etc. is an assessment upon each lot in accordance with the benefits received by it from the work. The point appears to be that the cost of the work which is to be assessed against the lands of the district may exceed the benefit, with the result that the assessment on those lands while *in proportion* to the benefits may not be *in accord* with the benefits accruing to each lot from the work. We do not think the act, fairly read, so contemplates or provides. When it provides for the establishment of 'the district benefited by said work', it contemplates a district that will in fact be *benefited* by the completion of the proposed improvement under the terms of the act, including the imposition of the cost thereof upon the lands of the district. If this be the proper construction of the act in this regard, as we think it is, the objection made is without force. That the *exact* cost of the proposed work is not known until after the establishment of the district, is unimportant, it can be approximately determined with sufficient certainty to avoid the possible condition suggested by counsel. There is no suggestion that any such condition exists in the case at bar.

The proceeding is dismissed" (178 Cal. at pp. 63-64.)

In the instant case, the District Court of Appeal refrained from discussing either of the two points decided by the Supreme Court of California in the Rockridge case, saying:

"The next several contentions of the appellants have reference to questions which were considered and decided adversely to the appellants' position in the case of Rockridge Place

> v. City of Oakland *supra* and hence a restatement or reconsideration of those matters is deemed unnecessary" (tr. p. 115, fol. 241c).

After the decision by the District Court of Appeal, a petition for a rehearing by the Supreme Court was denied, the Court referring to the contention persistently made by us that the change of grade under the forms of Part I of the Act of 1911, without any attempt to consider, ascertain or provide for the damages caused by the lowering of the grade, operated to deprive plaintiffs of their property without due process of law and to deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. This contention has also been pleaded in our complaint (tr. pp. 16-17, fols. 36-38). The trial court, also, found this contention, amongst others, to be without avail (tr. pp. 52-53, fols. 120-21).

With respect to this contention, the Supreme Court of California said:

> "The effect would be, if nothing further occurred, that the change of grade would actually take place without previous compensation to the owners for the damages caused thereby, if any. If this closed the case, so far as the right to damages is concerned, we do not think the principles of justice would allow such a proceeding without the test of an examination in the courts. But the remedy of the property owners in such a case is not to enjoin the collection of the assessment levied to pay the cost

of the work, but to enjoin the performance of the contract prior to the work having been done until damages are paid, in case the result of such work would cause damage to the abutting property. It constitutes no defense against the collection of the assessment. That the city is liable for damage caused to the abutting property by excavation or fills of a street in front thereof, see Eachus v. Los Angeles, 130 Cal. 493; Eachus v. Los Angeles etc. Co., 103 Cal. 416; Reardon v. San Francisco, 66 Cal. 506" (tr. pp. 115-16, fol. 242).

Specifications of Error.

1. The Court erred in holding and deciding that the "Improvement Act of 1911" of the Legislature of the State of California, approved April 7, 1911, was valid and not in violation of Article Fourteen of Amendments to the Constitution of the United States, and that plaintiffs in error are not thereby deprived of their property without due process of law nor denied thereby the equal protection of the laws, in the following respects:

(a) That said Act makes no provision for the ascertainment, consideration of or offsetting of damages against benefits, and makes no provision for compensation for damage done by a change of grade.

(b) That said Act makes no provision for measuring the quantum of benefit to the property of plaintiffs in error and provides no rule for appor-

tioning the assessment so that the assessment will not exceed the benefit derived by said property.

(c) That under the rule of assessment prescribed by said Act, the total cost of the work may exceed the total benefit, and the assessment against the property of plaintiffs in error may exceed the benefit derived by such property.

2. The Court erred in holding and deciding that the proceedings had and taken under the provisions of said Improvement Act of 1911 were valid, and not in violation of Article Fourteen of the Amendment to the Constitution of the United States, and that plaintiffs in error are not thereby deprived of their property without due process of law, nor denied thereby the equal protection of the laws, in the following respects:

(a) That said proceedings were so had and taken that the damage to the properties of plaintiffs in error were not and could not be ascertained nor considered nor set off against the benefits deemed to have accrued thereto, and that no provision for compensation was made for the damage done to said properties by the change of grade.

(b) That in making the assessment against the properties of plaintiffs in error, the quantum of benefit to said properties was not estimated or considered or assessed and said assessment was not made in proportion to the quantum of benefit to said properties, nor in accordance with the benefit.

(c) That in the delimitation of the district to be assessed for the expenses of said work, lands on streets through the center lines of which the boundaries of the district ran were excluded from the district, although said lands so excluded had precisely the same access to the improvement as lands on the same street and within the district, and necessarily were equally benefited.

Argument.

It is apparent that the Improvement Act of 1911 is an act of general and prospective operation, and that it does not provide a rule of assessment based upon a legislative declaration that the properties to be assessed will in general be equally and uniformly benefited by the improvement, as is the case where the rule of frontage or the rule of area is prescribed by a statute, and in which case the assessment is a mere matter of clerical computation.

Further, the work done in the present case was not the ordinary grading or paving of a street, but was a great change of grade, necessarily causing damage to abutting property. Inasmuch as the right of access to property is, as will be shown, recognized and protected by the California Constitution, and hence is protected by the Federal Constitution, it follows that the present case, which in-

volves the deprivation and the taking of that right of access, is within the rule and decision of

Norwood v. Baker, 172 U. S. 269,

and is not within the qualification of that case, as explained in

French v. Barber Asphalt Paving Co., 181 U. S. 324

and cases of like character.

Cf.

Martin v. District of Columbia, 205 U. S. 135;
Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55.

THE DISTRICT WAS DELIMITED WITH ARBITRARY DISREGARD TO THE RULE OF BENEFITS AND DELIMITED AS BETWEEN PROPERTIES LOCATED PRECISELY THE SAME WITH RESPECT TO THE IMPROVEMENT.

It seems to us that where, as here, exterior lines of the district pass through the center lines of streets leading to the improvement, it cannot be said that there was any exercise of judgment, since the property on such streets and outside the district are necessarily benefited equally with property on the same streets and within the district, for their access to the improvement and to every other place is precisely the same.

Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55.

The necessary result was to increase our assessment.

(Italics throughout will be generally ours.)

Under the provisions of the California Constitution (Art. I, Sec. 14):

> "Private property shall not be taken or *damaged* for public use without just compensation having been first made to or paid into Court for the owner."

As held in

Wilcox v. Engebretsen, 160 Cal. 288,

and in the numerous cases therein cited, the right of access to property abutting on a street is a property right of as high dignity as the ownership of the tangible realty itself, and, as said at page 299:

> "Under the Constitution, the ascertainment and payment of such damages in the mode therein prescribed, *is a condition precedent to the right of the City to do the public work which will cause the damage.*"
>
> *Lewis on Eminent Domain* is cited.

In

Mulhker v. N. Y. & N. H. R. Co., 49 Law. Ed. 872; 197 U. S. 544,

at page 878, this Court quoted *I Lewis Eminent Domain,* Section 91e, saying that the cases cited

> "established beyond question the existence of these rights of easement, of light, air, and *access* as appurtenant to abutting *lots, and that they are as much property as the lots themselves*"

and held that where such rights appurtenant to abutting property are established by the laws or decisions of a state, they are thereby placed under the protection of the Constitution of the United States as effectually as the ownership of the land itself.

Taking the access of our land for public use brings the case as clearly within *Norwood v. Baker,* 172 U. S. 269, as taking the land itself, and the California Court concedes that in the latter case *Norwood v. Baker* is still law (tr. p. 115, fol. 241c).

A STATUTE ATTEMPTING TO AUTHORIZE THE DOING OF WORK SUBSTANTIALLY CHANGING THE GRADE ON THE LINE OF AN ABUTTING OWNER, WITHOUT ALSO PROVIDING FOR THE ASCERTAINMENT OF DAMAGES AND COMPENSATION THEREFOR, IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS DEPRIVING US OF OUR PROPERTY WITHOUT DUE PROCESS OF LAW. SO IS THE ACTION OF A MUNICIPALITY WHEN IT DOES THE SAME THING CONTRARY TO OR WITHOUT THE AUTHORITY OF A STATUTE SO PROVIDING.

We contended that there is *no* statute in California authorizing the doing of work resulting in a change of grade without provision for ascertainment of damage and compensation.

As held in the *Engebretsen case,* 160 Cal. at page 299, following the uniform course of decision, the ascertainment and payment of damages for a change

of grade prior to the doing of the work that will cause the damage

> *"is a condition precedent to the right of the City to do the public work which will cause the damage".*

Hamilton, Special Assessments, Sec. 813, says:

> "Conditions precedent to the making of a valid assessment must on no account be omitted, or the result will be a nullity."

And where the damages are required to be assessed and determined and tendered to property owners before making a change of grade, this

> "is mandatory; the proceedings of a Council in changing grade, making contract therefor, and levying an assessment to pay for the same, without first assessing and tendering damages are void." (Sec. 584), and
>
> "When a change of the grade of a street *is itself the improvement for which benefits are assessed, or is a part of or incident of such an improvement, the assessment for damages should be made at the same time and as a part of the assessment for benefits."* (Sec. 585), and
>
> "Where the law requires benefits and damages both to be assessed, a disregard of this requirement renders *all* the proceedings *coram non judice."* (Sec. 436).

Mr. Page on California Street Laws says at pages 345 to 346 that it is an "important question whether an assessment is valid when no provision has been made for payment of damages," and that where the physical work of changing the grade is to a grade

other than the (original) official grade, it appears on the face of the proceedings that the work has not been legally done, *and it seems to him that no valid assessment can be levied.*

Speaking of the acts requiring the ascertainment and prior payment of damages before doing the physical work of changing a grade, Mr. Page says at page 535:

> *"The necessity for such an act arises from the constitutional provision that property is not to be damaged for public use without compensation."*

We contended in this connection, that if, in making this change of grade, Part I of the Improvement Act of 1911 was intended by the Legislature to be applicable, then the statute is in this respect not only in violation of the State Constitution but is also in violation of the fourteenth Amendment as depriving us of our property without due process of law. But the California Court ruled otherwise.

In the action for damages, whatever may happen to be the elements to calculate, the measure of our damages is the difference in the value of the property just prior to and just after the change of grade, and by reason thereof. In the *Rockridge* case, *supra,* we have a judicial determination that our damage is $750: in the *Wright* case, *supra,* $2000. In estimating the damage the Court necessarily found the ultimate fact to be that the market value of the properties was, in the one case, $750, in the

other case $2000, less just after the excavation than it was before, and by reason thereof. In arriving at this ultimate fact, benefit, if any, to the properties by the change of grade was necessarily considered as an element of the value after the excavation. Accordingly, in our action to obtain "just compensation", we were necessarily charged for the benefit, if any. But in the independent assessment proceedings here under consideration, we are also charged for the benefit, in the one case charged $663.27, in the other case charged $1205.27. Consequently in the case of the land that, in the circumstances, has diminished in value $750, our total net recovery as "just compensation" is only $86.73, and in the case of the $2000 loss, our total net recovery is only $794.73. This result shows the necessity, recognized by the authorities, for a consideration of damages in the assessment proceeding. In no other way can "just compensation" be obtained.

Let this situation be viewed from another angle.

In an action to recover against the municipality for damages resulting to our property by reason of work constituting a public improvement the jury is compelled to estimate:

(a) The damages caused by reason of the work;

(b) The benefits derived by reason of the work and to deduct the quantum of benefit from the quantum of damage.

Moran v. Ross, 79 Cal. 549.

If, without providing for an ascertainment of damage in the assessment proceeding, the City of Oakland is permitted to ascertain benefits without regard to questions of damage, and to charge against us the benefits which in their view the property derives by reason of the work, then it is manifest that the compensation which we can obtain under the laws of this state falls short of *just compensation, by reason of the fact that benefits are twice deducted from our damage.* As Mr. Page, California Street Laws, at page 650, points out, there is a constitutional question here involved, because, *"the owners certainly cannot be charged twice for the same benefit."*

It follows that if the city can proceed, as it proceeded in this case, under Part I of the Improvement Act of 1911, which provides for no consideration, ascertainment or payment of damages, then there does not exist in this state any remedy by which we can obtain just compensation for our injury, for the judgment recovered in the action at law will be taken away by the exact amount of the assessment in these proceedings. In the action at law, the benefits were necessarily deducted, and now out of the judgment we will have to satisfy the assessment for benefits.

The California Legislature recognizes that *Norwood v. Baker* is still in effect, and that damage caused by a change of grade is subject to the same consideration as is the taking of the corpus of land,

for in Part II of the Act of 1911, sec. 46 (this same Act), it is provided that:

> "The Commissioners having determined the damage which would be sustained by each petitioner, *in excess of all benefits,* shall proceed to assess the total amount thereof * * * upon the several lots of land benefited within the district of assessment, so that each of the lots shall be assessed *in accordance* with its benefits caused by such work or improvement * * *"

This is quite a different thing from the rule provided in the same Act in Part I, sub. 10, whereunder the present assessment was made and which, we had supposed, deals with the ordinary case of grading, paving or other work not causing injury: the rule in such case being to

> "proceed to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district *the total amount of the costs and expenses of such work,* and in so doing shall assess said total sum upon the several pieces" etc. "benefited thereby, to wit: Upon each respectively, in proportion to the estimated benefits to be received by each of said several lots" etc.

In

> *Zeilda Co. v. Phoenix Construction Co.* (Mo.), 126 S. W. 788,

where there was no consideration or ascertainment of damages for changing a grade, an assessment for

the work of grading was held void in a collateral proceeding; *"all the proceedings were void"*.

See also

Garden v. City of Parkville, 90 S. W. 115.

In

Whitaker v. City of Deadwood (S. D.), 82 N. W. 202,

it was held that an assessment was void when made for a change of grade without provision for prior ascertainment of damages. The Court said:

> "It was the duty of the City before proceeding to grade and macadamize the streets in accordance with the newly established grade to take the proper proceedings to ascertain damages which property holders along those streets might sustain by reason of the new grade. *Failing to do this, the City could not legally impose any share of the expense of making the improvement upon the appellant."*

In

John V. Connell (Nebr.), 85 N. W. 82,

it was held that a prior ascertainment and payment of damages is *mandatory and indispensable to a legal change of grade,* and that by reason of not having provided for such ascertainment and payment, the city *"never acquired jurisdiction to levy the grading tax"*.

Just as the California Court said in the *Engebretsen* case, so the Court said in the above case:

"It was a condition precedent to the exercise of the power to order the grading to be done."

In

Overman v. City of St. Paul (Minn.), 39 N. W. 66,

it was held that a physical change of grade without ascertainment and payment of damages was *in excess of the jurisdiction of the City*

and

"being without authority of law, the plaintiff was not obliged to seek her remedy in the same proceedings, by appeal or otherwise".

In

Carpenter v. Board of Commissioners (Minn.), 58 N. W. 295,

assessments *were held void* because, as the Court said:

"As no provision is made for compensation to riparian owners on the lake, it follows that, if they are entitled to compensation, in other words, if what is proposed to be done constitutes a taking of their property, *the assessments are void.*"

In

Mayor v. Porter, 18 Md. 284; 79 Am. Dec. 686,

it was held that because the city

"without making an ascertainment of damages to the owners" "went on to have the work done

and assessed upon the property a tax to pay the cost and expense of the grading", "all the proceedings in the premises were *coram non judice and void*".

To the same effect see:

Mayor v. Horn, 26 Md. 199;
Horn v. Mayor, 30 Md. 222.

The same thing is held in

Herford v. Omaha, 4 Nebr. 336.

In

Lieberman v. City of Milwaukee (Wis.), 61 N. W. 1112,

it was held that where there was a change of grade *"the assessment in question is void on its face, for a failure to show affirmatively" that prior ascertainment and payment of damages had been made.*

See, also:

Clarke v. City of Elizabeth, 40 Atl. at page 623 (N. J.);
Anderton v. Milwaukee, 15 L. R. A. 830 (Wis.).

The Act of 1911 contains in Part II thereof a complete constitutional scheme for ascertaining damages and benefits upon change of grade. *That scheme was not adopted in the present proceedings in spite of the serious change of grade provided for and effectuated.* The record here shows, step by step, that the proceedings were under Part I of the

Act of 1911, *which we contended does not apply to a change of grade at all* but only to the case of the doing of work to an originally established grade. The record also shows conclusively that none of the steps required by Part II of the Act of 1911 for the ascertainment and payment of damages were pursued or attempted to be pursued.

The Legislature of California is aware that there is no constitutional authority to enact a statute providing for a change of grade, without at the same time requiring a prior ascertainment and payment of damages. As Mr. Page says at page 535, the necessity for such provisions

> "arises from the constitutional provision that property is not to be damaged for public use without compensation".

Consequently, the statutes providing for the doing of work constituting a change of grade contain full and complete schemes, in accordance with the Constitution, for the prior ascertainment and payment of damages, just as do the statutes authorizing the opening of streets.

Act of 1889 (General Laws, p. 1672), Secs. 6 et seq.;

Act of 1903 (General Laws, p. 1680), Secs. 5 et seq.;

Act of 1885 (General Laws, p. 1714), Secs. 38 et seq.;

Act of 1893 (General Laws, p. 1753), Secs. 6 et seq.);

Act of 1911 (General Laws, p. 1784), Secs. 43 et seq.;
Act of 1913 (General Laws, p. 1841), Secs. 6 et seq.

Nevertheless, since the California Court has held in this case that the city could validly levy the assessment by proceeding under Part I of the Act of 1911, and ignore Part II, which provides for ascertainment of damage and compensation in such cases, it seems to us that Part I of the Act must be held invalid in so far as it purports to permit a substantial change of grade resulting in substantial damage to these rights of access now as fully under the protection of the Federal Constitution as the corpus of the land itself.

In any event the rule of *Norwood v. Baker* should be applied. Such a ruling would only have the effect of compelling the city to pursue one of the many statutes applicable and would discourage such attempts to evade payment for damage done.

IF UNDER ALL THE CIRCUMSTANCES PART I OF THE IMPROVEMENT ACT OF 1911 COULD BE CONSTRUED TO GIVE THE COUNCIL AUTHORITY TO DO THE WORK OF CHANGING A GRADE WITHOUT PRIOR ASCERTAINMENT OF DAMAGES AND COMPENSATION, THEN THE ACT OF 1911 WOULD IN THIS RESPECT BE VOID AS IN VIOLATION ALSO OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS DENYING TO US THE EQUAL PROTECTION OF THE LAWS.

We have consistently contended that inasmuch as the statutes in this state (including Part II of the

Improvement Act of 1911) furnish a complete constitutional scheme for the prior ascertainment and payment of damages on a change of grade, it follows that if Part I of the Act of 1911 is to be construed to permit the Council to proceed without such prior ascertainment of damages and compensation, then Part I of the Improvement Act of 1911 is, to that extent, void, not only as depriving us of our property without due process but also as denying to us the equal protection of the laws.

Can it be contended that a statute can give to the Council the power under precisely the same circumstances to deny the right to prior ascertainment of damage and compensation in the case of one land owner, or set of land owners, and to grant it to another? This question was presented in

Anderton v. Milwaukee (Wis.), 15 L. R. A. 830.

That case involved a change of grade and it was contended that the statute made the general rule of compensation inapplicable with respect to the portion of the street involved. The Court said, at p. 832:

> "It is one of the purposes of American constitutional law to prevent all such special class legislation. This Court has repeatedly held void such discriminatory exercise of arbitrary legislative power. (Citing cases.) * * * It was to prevent such discrimination in the rights of persons and property that the Constitution of the United States was amended so as to declare that no state shall 'deprive any person

of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' Here the Act, as to owners of lots in the particular blocks mentioned, dispensed with any petition or hearing, and took away all right of compensation for any change of grade, whatever might be the injury or damage. It attempts to make an arbitrary classification and distinction, in regard to such an established grade, between lots similarly situated and subject to the same, or substantially the same, conditions. This is certainly in violation of the constitutional provision quoted."

The point was also clearly involved in

People v. Greene, 64 N. Y. 606.

Said the Court:

"An examination of the various statutes shows that the policy of awarding damages to owners of real estate, caused by a change of grade of streets, has been adopted and for many years established by law in the City of New York, and although the statutory provisions respecting public improvements have so complicated the subject as to render it difficult of understanding, *it cannot be supposed that there was an intent to allow such damages to owners on one street and withhold them on another; and before such a result is reached, it should be clearly demonstrated that the requirements of law demand it.*"

The precise question was also involved in

Clark v. City of Elizabeth (N. J.), 40 Atl. at p. 623.

The argument that the city can, in its discretion, make compensation, or not make compensation on a change of grade as it sees fit,

> "leads beyond the limit of permitting the several cities to adopt the general policy of compensating or not compensating owners of lands for injuries arising from changes of grade within the city limits. It would vest this discretionary power in each city with regard to particular streets, or even to individuals. *It would mean that it was within the competency of the municipal government to pay A for the injuries he had sustained, and deny B compensation for corresponding injuries.* I am unwilling to adopt that construction of the Act of 1889. The Act was obviously not designed to subvert the policy established by the Act of 1858. Its purpose, as indicated by the title of the act and the introductory part of the enactment, was to extend the policy established by the Act of 1858 to all the cities of this state. Compensation to owners of lands for damages caused by the alteration in the grades of public streets and highways is, to adopt the language of Mr. Justice Scudder, 'so accordant with the principles of natural law and exact justice, that I should be unwilling to hold that the legislature could take a step backward, and thereby reimpose this onerous servitude upon private property.' *The power granted to the city authorities to assess damages and assess for benefits as a means of compensating the owners of lands for injuries from changes in the grades of streets was conferred upon these officials, not for the benefit or advantage of the inhabitants or taxpayers of the city, nor for city purposes in the administration of municipal affairs. The power is one that ex-*

ists for the benefit of the persons injured by such public improvements as the parties interested, and the authority to have an assessment of damages made is a power given for their benefit, and, although expressed in language in form discretionary, is in reality upon settled principles imperative."

If the Legislature itself can not constitutionally make a discrimination as between property owners on different streets as to their right to prior ascertainment of damages on a change of grade, are the municipal authorities vested with greater power to act arbitrarily in this respect?

THE IMPROVEMENT ACT OF 1911 IS IN VIOLATION OF THE FOURTEENTH AMENDMENT, AND OPERATES TO DEPRIVE US OF OUR PROPERTY WITHOUT DUE PROCESS, SINCE IT DOES NOT PROVIDE A RULE THAT LIMITS THE ASSESSMENT TO THE BENEFITS.

The Supreme Court of Massachusetts in

Lorden v. Coffey, 60 N. E. 124,

through Mr. Justice Holmes, said with regard to the Act of the Legislature involved in that case:

> "It is argued that, although the cost is to be divided among the estates liable *in proportion to the benefit, the cost may be greater than the benefit, and that therefore an attempt to charge it all unconditionally to the benefited estates is void under recent decisions.* * * *
>
> We are of the opinion that the argument is sound, and that the statute cannot be sustained. * * * There is no escape from the construction that the whole assessable cost is to be

> paid. * * * Plainly it (the cost) may be greater than the benefit to the adjoining estates. The proportion in which the board shall determine that the parcel of land is increased in value determines the amount for which each parcel is to be liable, it is true, *but as the total cost is to be divided among the several parcels, there is no chance to read the reference to this proportion as implying that the charges shall not be more than the benefit.* The only effect which it can have is to determine the parcels which collectively must pay the whole. We are unable to construe the statute in such a way as to make it consistent with the Constitution."

In that case the Act required, as here, that the total assessable cost, including incidental expenses, should be assessed against the land within the district benefited, *in proportion* to the benefits.

Lorden v. Coffey, supra, was confirmed by this Court in

> *Martin v. District of Columbia,* 205 U. S. 135, 51 L. Ed. 743.

The Act of 1911, Part I, Sec. 20, subd. 10, provides that there shall be assessed:

> "Upon and against said lands in said assessment district *the total amount of the costs and expenses of such work,* and in so doing shall assess *said total sum* upon the several pieces, parcels, lots or parcels of lots, and subdivisions of land in said assessment district benefited thereby, to wit, upon each respectively, *in proportion to the estimated benefits* to be received by each of said several lots, portions of lots, or subdivisions of land."

But the Supreme Court of California says (*Rockridge Place Co. v. City Council,* 178 Cal. at 64):

> "That the *exact* cost of the proposed work is not known until after the establishment of the district, is unimportant. It can be approximately determined with sufficient certainty to avoid the possible condition suggested by counsel. There is no suggestion that any such condition exists in the case at bar."

A complete answer is found in the fact that the Act of 1911 does not require any estimate of the cost to be made at all. By Section 8, an estimate of costs and expenses need be furnished by the City Engineer *only "if required by it"* (the Council), and no such requirement was made in the present case (tr. p. 91, fol. 194).

Even when required by the Council, the estimate is only to be made *prior to the resolution for the doing of the work, and is not to be made at the time of, or prior to the time set for, the hearing of the Resolution of Intention* delimiting the district, at which hearing alone, under the Act, could any protests or objections "against the proposed work or against the extent of the district" be heard. Consequently, under the Act, no estimate could in any event have any effect on the question involved here.

In

Sedalia v. Donahue, 190 Mo. 407,

it was held that an assessment could not, in the nature of things, be made until after the work was

done or a contract entered into therefor, because *even*

> *"upon an estimate of the cost"* the Council "could not levy and assess the special tax for the doing of the work, for the Council would not at that time know what the cost of the work would be, and therefore could not apportion it by the original ordinance. *Until the contract for the doing of the work was let, no one could know what the cost of the improvement would be."*

In the record in the *Rockridge* case, *supra,* it appears that five contractors filed bids for this work. Their bids were as follows:

Marsh Bros. & Gardenier	$26,338.44
Bates & Borland	26,626.32
Blake Bros. Company	33,811.29
Hutchinson Company	35,217.32
Chambers & Heafy	48,954.35

Between the lowest and the highest bid of the various contractors, after presumably careful investigation of the work and its character, *there is on the face of that record a difference of $22,615.91.*

The natural fact is that the work of excavating through a hill is highly speculative as to its cost, depending upon the character and hardness of the material and rock encountered. Some material can be cut down with the slightest effort. Other material requires a steam shovel. Other material requires blasting, sometimes at great expense. In cases of excavation of this character the contractors

bid for the work (as is illustrated by the bids in this case) to a considerable extent with a view of a sporting chance of profit.

A protestant against the work is given no right to make an effective protest having any bearing upon the question of the cost of the work. He may attack the expediency of having the work done, just as he could on the advertised hearing in the Massachusetts case (Stats. 1891; Chap. 323; Sec. 5). Or he may attack the extent of the district, but his attack against the extent of the district is necessarily limited to two objections, (1) that lots not included within the district are benefited and should be included; (2) that his land is not at all benefited and should not be included within the district (Sec. 6).

No objection he may make can be conceived as going to the question whether the whole district properly to be included is benefited *to the extent of the whole cost of the work, plus the incidental expenses.* If a statute should give him any such right of objection, it would be useless because he could not arrive at even the roughest kind of approximation as to the cost.

The determination of the extent of the district can in no event be a determination of any other proposition than that *all the land in the judgment of the Council to be benefited by the improvement is included, and that no land which, in the judgment of the Council, is not benefited, has been included.*

It is, therefore, obvious that no hearing upon the question of the extent of the district has any relevancy to the inquiry now being pursued. As said in the *Lorden* case, *supra,*

> "The only effect it can have is to determine the parcels which collectively must pay the whole" cost; and "plainly, it (the cost) may be greater than the benefit."

The statute does not furnish a constitutional rule of apportionment binding upon the conscience of the assessing tribunal.

Nor can the suggestion of the Supreme Court of California, that we have a hearing as to the *amount* of our assessment, have any relevancy.

Such a hearing was fully provided for *before a jury* in the *Martin* case; and yet this Court applied the principle for which we contend. *The very point is that upon that hearing* the assessing tribunal is by the statute compelled to apply a rule of apportionment that has no regard to the production of an assessment in *accordance* with benefits.

The practical operation of an Act like the present is shown by the fact that where some of the property owners are satisfied with the amount of the assessment against their property and do not appeal to the Council, and where others of the property owners are dissatisfied and do appeal, the Council can make a deduction from the assessment of those who appeal and who, in the judgment of the Council, were overassessed, *but any such de-*

duction so made must be in some manner distributed over the rest of the district regardless of everything. Under the terms of the Act a property owner cannot appeal to the Council unless he has an objection and states his objection in writing. Therefore, one who thinks that the assessment against his property is a fair assessment cannot, and does not, appeal. *Yet in his absence the Council determines that the assessment of the property on Chabot Road (as in this case) is in excess of the benefits and therefore reduces the amount of the assessment on Chabot Road. But the Council then is placed under the necessity of distributing this deduction over the whole district in accordance with some method, and in the necessary absence of the parties to be affected.*

> "Q. When the Council found that the assessment which you had formerly made on Chabot Road was excessive to the extent of 50 cents per front foot, on the Chabot Road, it was necessary for them to put that excess somewhere else in the district, if they took it off the property upon the Chabot Road?
>
> Mr. Soto. We object to that. It is self evident.
>
> The Court. I don't think it is necessary to offer any evidence on that" (tr. p. 98, fol. 209).

In the present case the Council did not, as the statute requires, make this distribution in proportion to benefits, nor in accordance with benefits, but solely on all the land in the district in proportion to area. It must, we think be conceded upon the reasoning of the Massachusetts case and

of the Martin case, that such a necessity thus imposed upon the Council by the statute, namely, to see to it that every cent of the cost of the improvement be assessed regardless of the question of the quantum of benefit, results in a hearing before the Council that is more political than judicial. A study of *Hamilton on Special Assessments* shows the impression made upon the mind of a student of these laws by the arbitrary manner in which these inferior tribunals are altogether too prone to proceed. Says Hamilton, Sec. 57:

> "Not only property owners, but judges of the Courts of last resort, have expressed in forcible terms their opinion of the many acts of iniquity and injustice perpetrated under this system. 'Among the manifold evils complained of in municipal administration, there is no one, in my judgment, calling more loudly for reform than this arbitrary system of local assessments.' So said a distinguished Chief Judge of one of our greatest courts, and it has been echoed at many a hearing before other Courts. * * * The officers and boards vested with the power, being officers or employees of the municipality, fail to appreciate the fact that the law imposes upon them duties which are judicial in their nature, and that they should be as strenuous in protecting the property of an individual from undue imposition, on the one hand, as they are in preventing him from escaping the payment of a just tax, on the other. *But as a rule, the estimate of benefits is stretched so as to cover the entire expense of the improvement,* and the unfortunate and dissatisfied property owner is relegated to the narrow remedy usually given by statute; and, if the amount be comparatively small, it is less

expensive for him to submit to the injustice than to assert his right. In the great majority of instances, the rankest injustice is thus permitted."

THE RESOLUTION OF THE CITY COUNCIL ON APPEAL IS VOID INASMUCH AS IT DOES NOT DISTRIBUTE THE SUM OBTAINED BY DEDUCTING FIFTY CENTS PER RUNNING FOOT FROM THE ASSESSMENT AGAINST ALL PROPERTIES ON CHABOT ROAD, OVER THE DISTRICT IN ACCORDANCE WITH THE RULE OF BENEFITS OR IN ACCORDANCE WITH THE RULE OF PROPORTION TO BENEFITS. BY DISTRIBUTING SAID SUM OVER THE WHOLE DISTRICT IN PROPORTION TO AREA, THE ACTION OF THE CITY COUNCIL WOULD, IF CARRIED INTO EXECUTION, DEPRIVE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND DENY TO THEM THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

We contend that when on appeal the City Council finds it proper to reduce a portion of the assessment on certain properties, the total sum so deducted can be re-assessed only in accordance with the same constitutional rule of apportionment that would be applicable in the case of an original assessment.

We submit that even upon the record in certiorari in the *Rockridge* case, the District Court of Appeal was right in quashing this assessment and that the Supreme Court of California was wrong in setting aside that judgment. The fact that there was no oral testimony adduced on the subject in that proceeding was immaterial, since all the assessment diagrams were before the Court showing the front-

age and areas of all the parcels of land in the district, and there was also before the Court the assessment appealed from and the re-assessment directed by the City Council on the appeal. By mere mathematical computation the fact appeared that fifty cents per running foot had been deducted from the assessment against every parcel of land on Chabot Road, and that the total sum thus deducted, viz., $4462.03, had by the Council been added to the assessment against all the lands in the district in precise proportion to area. *In the present case the evidence is direct to the point, and undisputed* (tr. p. 98, fols. 208-10). The assessments, both the original assessment by the Superintendent of Streets and the ultimate assessment as directed by the City Council, show conclusively that area was not in any sense considered by anybody to be the criterion of benefit because there was the utmost diversity in the relation of the lots to the improvement and the utmost diversity in the relation of the assesments to area. It is only this sum deducted from Chabot Road that is distributed over the whole district in proportion to area. The rest of the assessment is enormously out of any relation to area.

Hamilton on The Law of Special Assessments says:

> Sec. 507. "Where the principle of benefits is the definitely prescribed method of assessment, the Courts are very rigid in protecting it against encroachment. While, as we have just seen, property similarly situated may be

> supposed to be similarly benefited, *the presumption is quite to the contrary where the physical situation is such as to preclude the probability of equal results.*"

In *People v. Desmond* (N. Y.), 78 N. E. 857, the Court of Appeals held that where the statute provides for an assessment in proportion to benefit and the assessment appears by the record to have been made in proportion to frontage, the assessment cannot be sustained on certiorari unless it affirmatively appears that the situation of the land is such as to make the two methods equivalent in their results. *And the finding of the assessing tribunal that the assessment "as laid is a benefit to the property owners equally," is under such circumstances "merely a statement of a conclusion".*

The Court said, with reference to a finding in the Commissioners' report that they had apportioned the assessment in proportion to benefit:

> *"Construing that to be a declaration that they had apportioned it according to benefits, we are not concluded by it if the remainder of their record or the evidence shows the contrary.* The third clause of their report shows that the assessment was made per lineal foot of frontage on each side of the street, and the assessment made on the property of the appellant Merrill shows that it was made per lineal front foot. The amount of his assessment is $164.19. His foot frontage on the street is 195 feet. Dividing one by the other gives .842 cents, the amount the Commissioners say they fixed upon as the amount to be assessed per lineal foot front."

The assessment was held to be arbitrary and void. Cf.

Clapp v. City of Hartford, 35 Conn. 66.

In

People v. County Court, 55 N. Y. 604,

it was held that an assessment was void, although stated to be "an apportionment according to the benefit", when the record showed mathematically that it

"was imposed at the rate of $3.25 per acre".

Cf.

State v. Mayor, 36 N. J. Law 188.

It is submitted that no inferior tribunal proceeding out of the course of the common law is invested with jurisdiction to proceed arbitrarily, without regard to the rule of apportionment prescribed by statute.

In

Zottman v. City & County of San Francisco, 20 Cal. 97, 103,

Chief Justice Field said:

> "Aside from the mode designated, there is a want of all power on the subject. This is too obvious to require argument and so are all the adjudications."

Cf.

Swamp Land District v. Gwynn, 70 Cal. 566, 570-71;

Martin v. District of Columbia, 205 U. S. 135.

A property owner cannot be concluded as "to the existence of a uniform assessment". Failure to follow the rule of the statute is

> "wilful failure to make an assessment according to the plan provided by law".
>
> *Shaffer v. Smith,* 169 Cal. 764, 771.

When proceeding in accordance with the rule provided by a valid statute, the finding of the City Council that certain property is benefited, and the further finding as to the quantum of that benefit, is no doubt conclusive, unless palpably arbitrary and not to be reconciled with any rational view of the facts. It is otherwise when they depart from the statute (see also *State v. District Court* [Minn.], 53 N. W. 800).

See also:

State v. District Court (Minn.), 53 N. W. 800;

Walker v. Ann Arbor (Mich.), 76 Mo. 394;

Elwood v. City of Rochester (N. Y.), 25 N. E. 238;

State v. Brill (Minn.), 59 N. W. 989;

Kersten v. City of Milwaukee (Wis.), 81 N. W. 948;

San Diego Investment Co. v. Shaw, 129 Cal. 273;

Reclamation District v. West, 129 Cal. 622;

Reclamation District v. Burger, 122 Cal. 442.

Whether certiorari lies to review such action seems the test of its arbitrariness.

Martin v. District of Columbia, 205 U. S. 135.

In the present case plaintiffs were denied the right to a constitutional ascertainment and consideration of their damages; they were denied the right, as above shown, to a constitutional apportionment in accordance with benefit; and there was the crowning addition of insult to injury caused by the deduction of a considerable amount from the assessment of property on Chabot Road where no grading was done, and where no injury was occasioned, and the addition of a portion of such deducted sum to the assessment on plaintiffs' land, without any regard to or consideration of benefit or proportion of benefit, or damage, but in accordance with a purely arbitrary mathematical distribution in proportion to area.

Dated, San Francisco,
August 11, 1923.

Respectfully submitted,
C. IRVING WRIGHT,
F. E. BOLAND,
Attorneys for Plaintiffs in Error.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1922

No. 216

CHARLES BUTTERS, EDITH F. WRIGHT, ROCKRIDGE PLACE COMPANY et al.,
Plaintiffs in Error,

vs.

CITY OF OAKLAND; PERRY F. BROWN, as Superintendent of Streets; F. A. COOLEY, as Treasurer, etc., et al.
Defendants in Error.

In error to the District Court of Appeal of the State of California in and for the First Appellate District.

BRIEF FOR DEFENDANTS IN ERROR.
(ARGUMENT IS INCLUDED HEREIN)

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OCTOBER TERM, 1922

No. 210

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BRIEF FOR DEFENDANTS IN ERROR.

THE STATUTE INVOLVED.

Counsel having failed to do so we print, as an "Appendix" the "Improvement Act of 1911", here involved.

I.

PRELIMINARY STATEMENT.

It is not our intention to follow counsel for the plaintiffs in error in their argument. We shall merely present the questions of law from our own standpoint, from which it will appear, we confidently assert that the contentions of the plaintiffs in error, so far as they seem to have involved federal questions, have been foreclosed by previous decisions of this court. Consequently the remaining point is limited merely to local law.

In view of the foregoing it is our contention that the writ of error should be dismissed.

Miller v. Sacramento & S. J. Drainage Dist., 256 U. S. 129, 130-131.

II.

ERRATUM IN THE STATEMENT OF THE CASE MADE BY PLAINTIFFS IN ERROR.

In the statement of facts counsel for the plaintiffs in error, speaking of the character of the street work involved, say p. 2:

> "This work consisted in a great change and lowering of the grade on Broadway in the City of Oakland, in an ordinary grading of Patton Street and in the construction of the culverts, conduits, inlets and manholes, as shown in the resolution of intention (tr. pp. 67-73, fols. 148-161)."

Counsel are in error in stating that any part of the work consisted in a change and lowering of the

grade of any street, unless they mean that part of the work consisted in a reduction of the grade from the natural *to the official* grade established.

To show the mistake made by counsel we quote from that part of the resolution of intention which provides for the particular work to be done. The resolution declares, Record pp. 39-40:

> "Therefore the City Council * * * resolve and declare that it is the intention of said council to order the following work and improvement to be done in said city, to wit:
>
> "That Broadway from the production of the northeastern line of Patton street to a straight line drawn at right angles to the eastern line of Broadway at its intersection with the northern line of Ocean View drive, and Patton street from a line drawn parallel to and distant ten (10) feet southeasterly from the southeastern line of Fifty-ninth street to the western line of Broadway, each, *be graded* [italics inserted];
>
> "* * * * * * * *
>
> "Excepting, however, from the aforesaid work the grading of that portion of Broadway bounded as follows: on the northeast by the production of the southwestern line of Patton street; on the southeast by a straight line drawn from a point on the production of the southwestern line of Patton street distant, thereon, one hundred (100) feet southeasterly from the western line of Broadway to a point on the western line of Broadway, distant, thereon, three hundred twenty (320) feet southerly from the southwestern line of Patton street; and on the west by the western line of Broadway; also
>
> "Excepting such portions as are required by law to be kept in order or repair by any person or company having railroad tracks thereon."

It is clear that the resolution of intention in the case at bar did not provide for any change or alteration, or modification, of the official grade which had been established for Broadway.

The work contemplated was merely the *grading* of the street by doing work upon the surface of the ground to make the street, as graded, conform to the *official grade* theretofore established.

> Butters v. City of Oakland, 53 Cal. App. 294, 296-297.

> "To grade a street is to reduce it either by filling or excavating to a fit or established degree of ascent or descent."
>
> Wilcoxon v. San Luis Obispo, 101 Cal. 508, 510.

And in California when a resolution of intention declares that part of the contemplated work shall be grading, it means work in bringing the surface of the street, after the work of grading shall have been completed to the line of the official grade.

> German S. & L. Soc. v. Ramish, 138 Cal. 120, 128;
>
> Emery v. San Francisco Gas Co., 28 Cal. 346, 376.

III.

THE "IMPROVEMENT ACT OF 1911" AMPLY PROVIDES FOR DUE PROCESS OF LAW.

1. The lot owner may direct that no bonds be

issued when bonds have been provided for in the resolution of intention.

Act. sec. 65, Appendix xxv;

Ahlman v. B. A. P. Co., 40 Cal. App. 395, 405-406;

Elliott v. Horne Co. v. Chambers Land Co., 215 Pac. (Cal.) 99, 100-101.

If no bond was issued the assessment was enforceable by suit only.

2. After due notice and at a time prescribed by the Act the property was authorized by the Act (sections 3, 4, 5 and 6, Appendix, iv-viii) to object to the proposed *and* to the *extent* of the district, when a district assessment plan was proposed. *Ample opportunity for a full hearing of such objections* is accorded by the Act; but the plaintiffs in error *failed* to avail themselves of this remedy.

3. Again, section 16 of the Act (Appendix, xi-xii) affords further opportunity for objections. Once more, the plaintiffs in error failed to preserve their rights under this section.

4. Section 26 of the Act (Appendix, xvi-xviii) provides for an appeal to the city council from the assessment. One of the plaintiffs in error, Butters, *did* take an appeal and he was fully heard (Record, 49, fol. 112). Others took appeals from the same assessment. As a result of such appeals and hearing a *new assessment* was ordered by the council. (Record, 49-50, fols. 113-115.)

The resolution, directing the issuance of a new assessment, itself ascertained and fixed the amount to be assessed against each lot. *This* it was authorized to do by said Section 26 of the Act.

See said Resolution, Record 77-78, fols. 168-187;

Rockridge Place Co. v. City Council, 178 Cal. 58, 62-63.

As to those of the plaintiffs in error who did not appeal the decision of the council on the appeal of Butters and the others was equally conclusive. Those not appealing are to be treated as in default.

That the statute is valid in making the decision of the council *final and conclusive* is not open to question in this Honorable Court.

Hibben v. Smith, 191 U. S. 310, 321-322.

IV.

IF THE "IMPROVEMENT ACT OF 1911" IS CONSTITUTIONAL THE PLAINTIFFS IN ERROR WAIVED ALL THE OBJECTIONS WHICH THEY URGE HERE BECAUSE THEY DID NOT PROTEST UNDER SECTION 16 OF THE ACT.

The plaintiffs in error failed to avail themselves of the remedy prescribed by section 16 of the "Improvement Act of 1911", and, therefore, they cannot complain of any errors or mistakes, or irregularities antecedent to the award of the contract for the work,—*the resolution of intention having been*

duly published and the "notices of improvement" having been duly posted as provided by the act.

See section 16 of the "Improvement Act of 1911", post, pp. xi-xii, "Appendix;"

Campbell v. City of Olney, 43 Sup. Ct. 559, quoted infra;

Farncomb v. City and County of Denver, 252 U. S. 7, 11-12;

Keokuk & H. B. Co. v. Salm, 258 U. S. 122, 124-125.

V.

THE CONSTRUCTION BY THE STATE SUPREME COURT OF THE "IMPROVEMENT ACT OF 1911" MAKES THAT STATUTE CONSISTENT WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In Farncomb v. City and County of Denver, 252 U. S. 7, Mr. Justice Day, speaking for the court, said (10):

> "This court, when dealing with the constitutionality of state statutes challenged under the 14th Amendment, accepts the meaning thereof as construed by the highest court of the state. St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 427.
>
> "In Londoner v. Denver [supra, 210 U. S. 373] this court accepted, as it was bound to do, the construction of the [city] charter, and upon that construction determined its constitutional validity."

VI.

THE MODE OF ASSESSMENT ON THE DISTRICT PLAN, PRESCRIBED BY THE "IMPROVEMENT ACT OF 1911," IS CONSTITUTIONAL.

The provisions of the act dealing with the district plan and the mode of distributing the cost and expense are found in sections 4, 20 (subdivision 1 and 20).

Appendix, v, xii, xiii-xiv.

This mode of assessment according to area "in proportion to the estimated benefits to be received by each" lot, has been upheld in California.

Greenwood v. Morrison, 128 Cal. 350, 351;
Harney v. Benson, 113 Cal. 314, 318-319.

This same mode was sustained in this case and in the previous, companion case.

Butters v. City of Oakland, 53 Cal. App. 294, *passim*.

VII.

SINCE A POWER GRANTED CARRIES WITH IT ALL INCIDENTAL POWERS, NECESSARY TO EFFECTUATE THE MAJOR POWER IT MUST BE PRESUMED THAT, IF DEEMED NECESSARY, THE CITY COUNCIL HAD BEFORE IT AN ESTIMATE OF THE PROBABLE COST OF THE WORK WHEN IT PASSED THE RESOLUTION OF INTENTION DELIMITING THE AREA OF THE ASSESSMENT DISTRICT.

The "Improvement Act of 1911" must be reasonably construed, and, therefore, the incidental power

to procure the *estimate* referred to must be conceded.

Rockridge Place Co. v. City Council, 178 Cal. 58, 63-64 (involving the assessment here in question; see Record, p. 113);

Hunt v. Manning, 24 Cal. App. 44, 48-49.

Cf. City St. Impt. Co. v. Pearson, 181 Cal. 640, 646-647.

But since the statute does not, in terms, require an estimate to be made a *matter of record,* it need not so appear.

State v. Marsh, 107 Neb. 637, 187 N. W. 84, 86;

Hammond v. San Leandro, 135 Cal. 450, 452-454;

Clough v. Duffy, 152 Cal. 311, 314-315.

VIII.

THE PLAINTIFFS IN ERROR HAVE NO GROUNDS OF COMPLAINT.

The constitutional validity of the "Improvement Act of 1911" was sustained by the State Supreme Court before the decision in the case at bar, in a case involving the very selfsame assessment that is in question here. The act was upheld against every ground of objection which is now urged, here. That decision was made in

Rockridge Place Co. v. City of Oakland, 178 Cal. 58, 63-64.

This decision was followed in the case at bar (Record, pp. 113-116).

Butters v. City of Oakland, 53 Cal. App. 294-300.

IX.

THE QUESTION OF DAMAGES CLAIMED BY THE PLAINTIFFS IN ERROR IS A QUESTION OF MERE LOCAL LAW.

The local procedure, under statutes and decisions, being constitutionally adequate to protect a property against that may arise, or which have occurred, from a public improvement, the question of damages becomes here a matter of mere local law.

Engebretson v. Gay, 158 Cal. 27, 28-30, and the citations;

Rockridge Place Co. v. City Council, 178 Cal. 58, 64-65.

The plaintiffs in error, assuming that they *were* damaged, could have enforced the doing of the work until after their property or rights had been *condemned.*

Wilcox v. Engebretson, 160 Cal. 289, 298-299.

X.

UNDER PROVISIONS OF THE CALIFORNIA CONSTITUTION, UPHELD BY REPEATED DECISIONS OF THE STATE COURTS, A PROPERTY OWNER IS ENTITLED TO RECOVER DAMAGES FOR SUCH INJURIES (IF THEY HAVE OCCURRED) AS THE PLAINTIFFS IN ERROR ASSERT HERE.

The language of the state constitution is found in

section 14 of article I (Cal. Const. by Treadwell, 4th ed., pp. 163-164), and reads as follows:

> "Private property shall not be taken *or damaged* for public use without just compensation having first been made to, or paid into court, for the owner."

Reardon v. San Francisco, 66 Cal. 492, *passim;*

Colusa & H. R. R. Co. v. Leonard, 176 Cal. 109, 122-123;

Gray v. Reclamation District, 174 Cal. 622, 642-646;

Norton v. Ransome-Crummey, Co., 173 Cal. 343, 345-346;

Tormey v. Anderson Cottonwood Irr. Dist., 53 Cal. App. 559 (567-568, opinion by the State Supreme Court denying a hearing in that court).

This right of recovery of damages (if such damages had been suffered) was conceded to the plaintiffs in error in the opinion of the Supreme Court, refusing to grant a hearing *in that* court.

Record, 113-116, at pp. 115-116;

Butters v. City of Oakland, 53 Cal. App. 294, 299-300.

Indeed, the plaintiffs in error, other than Butters, have recovered damages for the very injuries of which they now complain.

Brief of Plaintiffs in Error, pp. 7-8, citing the decisions, viz.:

Rockridge Place Co. v. City of Oakland, 41 Cal. App. Dec. 42 (s. c. 216 Pac. 64), and Wright v. City of Oakland, 41 Cal. App. Dec., 45 (s. c. 216 Pac. 66).

In both of these decisions the state supreme court refused to grant a hearing in that court (see the statement in each in 216 Pac. 64 and 216 Pac. 66).

XI.

ASSUMING THAT THE PLAINTIFFS IN ERROR WERE ENTITLED TO DAMAGES FOR THE INJURIES CLAIMED TO HAVE BEEN SUFFERED BY THEM, THE STATE LAWS, AS CONSTRUED BY THE STATE COURTS, AFFORD ADEQUATE REMEDIES FOR THE RECOVERY OF SUCH DAMAGES.

The plaintiffs in error are not entitled to any special or particular remedy which might be more to their liking than what is provided for by the state statutes.

Crane v. Hahlo, 258 U. S. 142, 146-148 (and the citations at p. 147).

XII.

FUNDAMENTAL ERROR IN COUNSEL'S ARGUMENT.

The argument of counsel is basically erroneous because it fails to observe the distinction between proceedings affecting property under the taxing power, and proceedings having for their object the

expropriation of property under the power of eminent domain.

> Mobile Co. v. Kimball, 102 U. S. 691, 703-704;
> Houck v. Little River Drainage Dist., 239 U. S. 254, 264-265 and the citations;
> Hornung v. McCarthy, 126 Cal. 17, 21, et seq.

Because of the failure to note the distinction, above mentioned, counsel have cited many cases which involve questions of eminent domain, and not those which are in controversy here. For that reason we do not deem it necessary to attempt to explain or distinguish the cases cited, and to which we allude.

XIII.

THE DECISION OF A CITY COUNCIL UNDER SECTION 26 OF THE "IMPROVEMENT ACT OF 1911" ON AN APPEAL BY LOT OWNERS ASSESSED IS FINAL AND CONCLUSIVE.

In Cutting v. Vaughn, 182 Cal. 151, an appeal was taken from the assessment there in question to the city council. After notice and a hearing the appeal was denied by the city council. In a subsequent suit, for an injunction and to cancel the assessments on the plaintiff's property

> "on the ground that the same was (*sic*) not made in proportion to benefits received" (182 Cal. supra, at p. 153).

the plaintiff, having been nonsuited, contended in the appellate tribunal that error had been thus committed by the trial court (p. 155):

"by reason of the presence in the record of evidence indicating that the assessment of the property of the plaintiff corporation was not made in accordance with benefits received but was, on the contrary, made *on a purely arbitrary basis.*" (Our italics.)

In overruling this contention the court said (155-157):

"In making this contention plaintiff is met by a difficulty arising from the terms of section 26 of the Street Improvement Act of 1911. That section provides for an appeal to the city council by persons interested in determining the validity of an assessment made pursuant to the terms of the act, and also provides that the decision of the council upon the question presented upon such appeal shall be final. Pursuant to the provisions of this act an appeal was taken to the city council in the instant case. That body considered the appeal very seriously, witnesses were examined, arguments were made, and all of the formalities of a full hearing were observed. The city attorney and all of the trustees composing the council were present. At the conclusion of the hearing, the council duly entered its resolution upholding the assessment and overruling the appeal. The resolution recited that the council had heard and considered the evidence in relation to the appeal and the clerk certified that the resolution had been duly passed and adopted by a unanimous vote of all of the councilmen. Plaintiffs attack this resolution upon two grounds.

"It is first contended that the resolution should be disregarded for the reason that there is some evidence in the record to the effect that the council, not realizing the finality of its decision, and believing that the case would have to go to the courts in any event, may, for this rea-

son, have upheld the assessment as a matter of form. This contention is based upon testimony to the effect that during the course of the hearing one or more of the councilmen expressed an opinion that the assessment was unjust, but that, as the matter would go to the courts in any event, it would be fairer to the contractor to uphold the assessment. The contention is without merit. The council acted judicially in its determination upon the appeal, and, as in the case of the judgment of any tribunal for which there is no review provided by statute, its action must be held conclusive, in the absence of fraud, whenever the fact determined by it is brought into question collaterally before any other tribunal (*Lambert v. Bates,* 137 Cal. 676, 678, [70 Pac. 777].) The complaint herein contains no allegation of fraud in the conduct of the hearing, nor does the record reveal evidence of such fraud. Moreover, it is of course presumed that all public officers perform their duties in a lawful and proper manner. (16 Cyc. 1076.) When it is recalled that all of the formalities of a full hearing were observed, witnesses being examined, arguments being made, and the city attorney and all of the councilmen being present, when it is considered that the council was presumably acquainted with the terms of the statute providing that its determination upon the appeal should be final, and when these facts are considered in connection with the solemn recitations of the resolution itself, and in connection with the fact, determined elsewhere in this opinion, that the decision of the council is supported by the evidence, we cannot say that the evidence of the statements made by one or more councilmen before the conclusion of the hearing was sufficient to rebut the presumption that the ultimate decision of the board was based upon a full and fair consideration of the case upon its merits.

"It is next insisted that it appears from the record that there was a clear failure to assess the property according to benefits, and that, therefore, under the rule announced in *Spring Street Co. v. Los Angeles,* 170 Cal. 24, [L. R. A. 1918E, 197, 148 Pac. 217], the court should set the assessment aside irrespective of the action of the city authorities in confirming the assessment upon the appeal to them. Plaintiff cannot, however, complain of the nonsuit on this ground unless there appears in the record convincing and conclusive evidence that under no conceivable conditions could the several parcels of land have been benefited in the proportion stated by the assessment. (*Rockridge Place Co. v. City Council of the City of Oakland,* 178 Cal. 58, [172 Pac. 1110]; Nutting v. Los Angeles, 35 Cal. App. 519, [170 Pac. 680]; *Thoits v. Byxbee,* 34 Cal. App. 226, 235, [167 Pac. 166].)"

XIV.

THE CREATION OF THE ASSESSMENT DISTRICT BY THE LEGISLATIVE DEPARTMENT OF THE CITY OF OAKLAND IN PURSUANCE OF THE POWERS GRANTED BY THE "IMPROVEMENT ACT OF 1911" WAS FINAL AND CONCLUSIVE.

In Kansas City S. R. Co. v. Road Improvement Dist. No. 6, 256 U. S. 658, the court, although reversing the judgment of the State Court (139 Ark. 424; 215 S. W. 656; 47 S. W. 773) said (660):

"The settled general rule is that a state legislature 'may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55;

Houck v. Little River Drainage Dist., 239 U. S. 254, 262. Ordinarily, the levy may be upon lands specially benefited according to value, position, area, or the front-foot rule. French v. Barber Asphalt Paving Co., 181 U. S. 324, 342; Cass Farm Co. v. Detroit, 181 U. S. 396, 397; Louisville & N. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430; Withnell v. Reucking Constr. Co., 249 U. S. 63; Hancock v. Muskogee, 250 U. S. 454; Branson v. Bush, 251 U. S. 182.

"If, however, the statute providing for the tax is 'of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact.' Gast Realty & Invest. Co. v. Schneider Granite Co., supra."

In Hancock v. Muskogee, 250 U. S. 454, was involved the validity of a statute which authorized a municipal legislative body to provide for local improvements, and to fix the boundaries of the assessment district to be charged for the cost and expense for such improvement. The case arose in the State of Oklahoma which sustained the constitutionality of the statute. The case was then taken by a writ of error to the Supreme Court of the United States and the decision of the State court was there affirmed, the court saying, speaking through Mr. Justice Pitney, (455-459), quoting from 63 L. ed. 1082-1084):

"Plaintiffs in error, owners of real estate in the city of Muskogee, brought suit in an Oklahoma state court seeking an injunction to re-

strain the city and its officials from encumbering their lands with a special assessment to pay for the construction of a sewer in sewer district No. 12 of that city; contending that the statutes of the state and the ordinances of the city under which the district was created and the cost of the sewers therein assessed against the property within the district were in violation of the 14th Amendment, in that they deprived plaintiffs of their property without due process of law. The trial court refused relief, the supreme court of Oklahoma affirmed its judgment (..... Okla. ....., 168 Pac. 445), and the case comes here by writ of error.

"The statutes, as they existed at the time the proceedings in question were had, are to be found in Snyder's Comp. Laws (Okla.) 1909, secs. 984-993. They authorize the mayor and councilmen in any municipal corporation having a population of not less than 1,000 to establish a general sewer system composed of public, district, and private sewers, and also to cause district sewers to be constructed within districts having limits prescribed by ordinance; the cost of district sewers to be apportioned against all lots and pieces of ground in the district in proportion to area, disregarding improvements and excluding the public highways.

"It is contended that the statute is void because it gives no notice to property owners and makes no provision for hearing them as to the formation of the district or its boundaries, the proposed plan or method of building the sewer, or the amount to be assessed upon property in the district. While it is conceded to have been established by previous decisions of this court that, where the legislature fixes by law the area of a sewer district or the property which is to be assessed, no advance notice to the property owner of such legislative action is necessary in

order to constitute due process of law, it is insisted that in the present case the legislature has not done this, and hence it is essential to the protection of the fundamental rights of the property owner that, at some stage of the proceeding, he have notice and an opportunity to be heard upon the question whether his property is erroneously included in the sewer district because it cannot be benefited by the sewer, or for any other reason is improperly subjected to assessment.

"But we find it to be settled by decisions of the supreme court of Oklahoma, which, as to this, are conclusive upon us, that, in respect to the establishment and construction of local sewer systems and the exercise of the power of taxation in aid of this purpose, the entire legislative power of the state has been delegated to the municipalities. In Perry v. Davis, 18 Okla. 427, 90 Pac. 865, referring to this same legislation the court held (p. 445):

" 'When the legislature delegated the power to the mayor and councilmen of municipal corporations in this territory, having a bona fide population of not less than one thousand (1,000) persons, to establish a general sewer system, that delegation of power carried with it all the incidental powers necessary to carry its object into effect within the law. Of what utility would such a grant of power be if unaccompanied with sufficient power to carry it into effect? Under our system the power of taxation is vested exclusively in the legislative branch of the government, but it is a power that may be delegated by the legislature to municipal corporations, which are mere instrumentalities of the state for the better administration of public affairs. When such a corporation is created, it becomes vested with the power of taxation to sustain itself with all necessary

public improvements, unless the exercise of that power be expressly prohibited. That the mayor and council of the city of Perry were authorized to establish and construct a necessary sewer system for the city, in the absence of prohibitive statutes, should not be questioned. The power to establish and construct a sewer system carried with it the power to create indebtedness and taxation for its payment.' The court further held that the act constituted due process, and that the passage and publications of an ordinance establishing a sewer district constituted sufficient notice and conferred jurisdiction upon the city authorities to perform the work and provide payment therefor. This was followed in Muskogee v. Rambo, 40 Okla. 672, 680 [138 Pac. 567], and also in the present case.

"So far, therefore, as the present ordinance determined that a district sewer should be constructed, and established the bounds of the district for the purpose of determining what property should be subjected to the special cost of constructing it, there was an authorized exercise of the legislative power of the state, which, according to repeated decisions of this court, was not wanting in due process of law because of the mere fact that there was no previous notice to the property owners or opportunity to be heard. The question of distributing or apportioning the burden of the cost among the particular property owners is another matter. Spencer v. Merchant, 125 U. S. 245, 255-257; Paulsen v. Portland, 149 U. S. 30, 40; French v. Barber Asphalt Paving Co., 181 U. S. 324, 343; Shumate v. Heman, 181 U. S. 402; Phillip Wagner v. Leser, 239 U. S. 207, 218; Withnell v. Ruecking Constr. Co., 249 U. S. 63.

"We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legisla-

tive power, or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to parties aggrieved. The facts of this case raise no such question. See Phillip Wagner v. Leser, 239 U. S. 207, 220; Houck v. Little River Drainage Dist., 239 U. S. 254, 265; Myles Salt Co. v. Iberia & St. M. Drainage Dist., 239 U. S. 478, 485; Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55, 59.

"The chief reliance of plaintiff in error is upon those decisions which have held that where the legislature, instead of determining for itself what lands shall be included in a district, or what lands will be benefited by the construction of a sewer, submits the question to some board or other inferior tribunal with administrative or quasi judicial authority, the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included. Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 166, 167, 174, 175; Parsons v. District of Columbia, 170 U. S. 45, 52; Embree v. Kansas City & L. B. Road Dist., 240 U. S. 242, 247. But they have no application to a case where, as in the case before us, full legislative power over the subject-matter has been conferred by the state upon a municipal corporation. Where that has been done, a legislative determination by the local legislative body is of the same effect as though made by the general legislature. Withnel v. Ruecking Constr. Co., 249 U. S. 63, 70.

"It is suggested further that the statutes and ordinances in question were wanting in due process, in that they afforded the property owner no opportunity to be heard as to the distribution of the cost of the sewer among the different properties in the district or the ascertainment

of the amount of the assessment to be imposed upon the lands of plaintiffs in error. Respecting this, it is sufficient to say that as the legislature itself has prescribed that the entire cost of a district sewer shall be apportioned against the lots in the district in proportion to area (excluding the highways), there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned, since this is resolved into a mere mathematical calculation. And it is settled by the cases above cited that whether the entire amount or a part only of the cost of a local improvement shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots, or apportioned according to their frontage upon the streets, their values, or their area, is a matter of legislative discretion, subject, of course, to judicial relief in cases of actual abuse of power or of substantial error in executing it, neither of which is here asserted."

XV.

THE WRIT OF ERROR SHOULD BE DISMISSED FOR WANT OF JURISDICTION, THE ALLEGED GROUNDS FOR THE ISSUANCE THEREOF BEING SO UNSUBSTANTIAL AND WITHOUT MERIT AS TO BE CLEARLY FRIVOLOUS "OR WITHOUT SUPPORT IN REASON".

2 Enc. U. S. Reports, 303-304, and notes;

Mo. Pac. R. R. Co. v. Clarendon Boat Co., 257 U. S. 533, 535-536;

O'Callaghan v. O'Brien, 199 U. S. 89, 100-101;

Empire S-I. M. & D. Co. v. Hanley, 205 U. S. 225, 231-232;

Goodrich v. Ferris, 214 U. S. 71, 79-81;

Toop v. Ulysses Land Co., 237 U. S. 580, 582-583;

Piedmont Power & L. Co. v. Graham, 253 U. S. 193, 195.

XVI.

THE CONSTITUTIONAL OBJECTIONS HERE MADE ARE FORECLOSED BY PRIOR DECISIONS SO THAT THEY ARE NO LONGER OPEN TO ARGUMENT.

The constitutional grounds of objection to the "Improvement Act of 1911" have been so frequently overruled in strictly analogous cases that they are utterly frivolous as the basis of a writ of error, and, for that reason, the writ should be dismissed.

Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416, 421-422;

Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 288.

XVII.

THE FEDERAL QUESTION HAVING BEEN CORRECTLY DECIDED BY THE STATE COURT THE WRIT OF ERROR SHOULD BE DISMISSED AS THE WRIT DOES NOT REACH QUESTIONS OF MERE LOCAL LAW.

Swope v. Leffingwell, 105 U. S. 3, 4;

Eustis v. Bolles, 150 U. S. 361, 366.

In French v. Taylor, 199 U. S. 274, it was held, as aptly stated in the syllabus in 50 L. ed. 189:

> "A decision of a state court that the formalities required by the tax laws were fully observed does not present a federal question where the contention is not that the statutes are not unconstitutional, but that the manner of their observance was a denial of due process of law."

XVIII.

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW QUESTIONS OF MERE LOCAL LAW.

Cornell University v. Fiske, 136 U. S. 152, *passim;*

Mo. Pac. Ry. Co. v. McGrew Coal Co., 256 U. S. 134, 135.

XIX.

THE FINDINGS OF FACT AND THE EVIDENCE.

Under repeated rulings of this court the findings of fact must be accepted as made by the trial court. With respect to the evidence, which is discussed by counsel, no federal question is involved therein or suggested as arising therefrom or therein.

XX.

CONCLUSION.

We beg to submit a quotation from a decision of this Honorable Court, as covering nearly every federal question sought to be raised here.

In Campbell v. City of Olney, 43 Supreme Court Reporter 559 (s. c., Advance Opinions of the Supreme Court, No. 16, dated June 15, 1923) on dismissing a writ of error, the court said (quoting from Advance Opinions, pp. 607-608):

> "A statute of Texas (Rev. Stat. 1911, chap. 11, arts. 1006-1007) empowered the city of Olney to lay sidewalks and to assess the cost against abutting property and owners. The city ordered the construction of sidewalks in front of four lots owned by plaintiff in error. An ordinance was passed making the cost of sidewalks a lien against abutting property, and providing for twenty days' notice to the owner before charging such cost personally against him or as a lien upon his property. Plaintiff in error was given notice in compliance with the statute and ordinance. He failed to appear or make objection to the assessment.
>
> "The statute provides that any property owner against whom or whose property such assessment has been made, may, within twenty days, bring suit in any court having jurisdiction to set aside or correct the same or any proceeding with reference thereto, on account of any error or invalidity therein; but thereafter, he may not question the validity of such proceedings or assessment. No suit was brought by the plaintiff in error. The city issued its assessment certificate, declaring the cost of the sidewalks, $89.32, a charge against him and against the lots.

"The statute further provides that if any such certificate shall recite that the proceedings have been regularly had, and that all prerequisites to the fixing of the assessment lien and personal liability have been complied with, it shall be prima facie evidence of the facts so recited. The certificate contained these recitals. Plaintiff in error failed to pay, and the city brought suit in justice court. He answered, in substance, that the city had no ordinance authorizing the assessment; that it had not complied with the statute, and was therefore without authority to invoke it; and that its acts and conduct in making the assessment constituted a taking of his property without due process of law, in violation of the 14th Amendment. He contended that there should have been a specific ordinance concerning this sidewalk and assessment.

"The justice of the peace gave judgment in favor of plaintiff in error. The city appealed to the county court. At the trial it offered the assessment certificate in evidence and rested. Plaintiff in error offered to prove that no ordinance had been passed relative to the laying of this particular sidewalk; that he received the notice to appear, and went to the meeting place of the city council, and that the council had adjourned. He did not offer to prove any fact excusing his failure to appear before adjournment, or that he was denied a hearing. The county court found for the city. Its order denying a motion for a new trial recites that it is the highest appellate court to which the cause can be taken in the state of Texas because the amount involved is less than $100. The county judge allowed a writ of error bringing the case here.

"The judgment of that court necessarily determines that the state laws were complied with. Unless a Federal right is involved, the state

court's application of local laws will not be reviewed here. Hallinger v. Davis, 146 U. S. 314, 319; 36 L. ed. 986, 989; 13 Sup. Ct. Rep. 105; Peters v. Broward (Peters v. Gilchrist), 222 U. S. 483, 492; 56 L. ed. 278, 283; 32 Sup. Ct. Rep. 122; Armour Packing Co. v. Lacy, 200 U. S. 226, 234; 50 L. ed. 451, 456; 26 Sup. Ct. Rep. 232; Wade v. Travis County, 174 U. S. 499, 508; 43 L. ed. 1060, 1064; 19 Sup. Ct. Rep. 715; Osborne v. Florida, 164 U. S. 650, 654; 41 L. ed. 586, 587; 17 Sup. Ct. Rep. 214; Bardon v. Land & River Improv. Co., 157 U. S. 327, 331; 39 L. ed. 719, 721; 15 Sup. Ct. Rep. 650; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 32, 33; 25 L. ed. 989, 992, 993. Plaintiff in error had opportunity to be heard before the city council and was allowed a reasonable time after the assessment to bring suit to set it aside or to correct it or any proceeding with reference thereto. He failed to avail himself of the rights so given him by state laws. Their validity was not drawn in question. His claim that he was denied due process of law is not even colorable. Valley Farms Co. v. Westchester County, decided February 19, 1923 [.....U. S....., ante 323; 43 Sup. Ct. Rep. 261]; Withnell v. Ruecking Constr. Co., 249 U. S. 63, 69; 63 L. ed. 479, 483; 39 Sup. Ct. Rep. 200; Hibben v. Smith, 191 U. S. 310, 321, et seq., 48 L. ed. 195, 199; 24 Sup. Ct. Rep. 88; French v. Barber Asphalt Paving Co., 181 U. S. 324, 334, 344; 45 L. ed. 879, 886, 889; 21 Sup. Ct. Rep. 625, and cases cited. There is no Federal question in the case.

"The writ of error is dismissed." (Our italics.)

The defendants in error respectfully submit that the writ of error should be dismissed for want of

jurisdiction with damages for delay; or else that the judgment should be affirmed.

Dated: September....., 1923.

JAMES A. JOHNSON,
Of counsel for Defendants in Error.

GEORGE M. SHAW,
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Appendix.

STATUTES OF CALIFORNIA, 1911, pp. 730-769

CHAPTER 397.

An act to provide for work in and upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities, and upon property and rights of way owned by municipalities, and for establishing and changing the grades of any such streets, avenues, lanes, alleys, courts, places and sidewalks, and providing for the issuance and payment of street improvement bonds to represent certain assessments for the cost thereof and providing a method for the payment of such bonds.

[Approved April 7, 1911.]

The people of the State of California, represented in senate and assembly, do enact as follows:

PART I.

Part I.

Public streets defined.

Section 1. All streets, lanes, alleys, places or courts, in the municipalities of this state now open or dedicated, or which may hereafter be open or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts, for the purpose of this act, and the city council of each municipality is hereby empowered to establish and change the grades of said streets, lanes, alleys, places, or courts, and fix the width thereof, and is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in this act under the proceedings hereinafter described.

What work may be done.

Sec. 2. Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole or any portion or portions, either in length or width of any one or more of the streets, avenues, lanes, alleys, courts, places or public ways of any such city graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, and to order the construction or reconstruction therein of sidewalks, crosswalks, culverts, bridges, gutters, curbs, steps, parkings and parkways, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, with

outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances; pipes, hydrants and appliances for fire protection; tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water; and poles, posts, wires, pipes, conduits, lamps and other suitable or necessary appliances for the purpose of lighting said streets, avenues, lanes, alleys, courts, places or public ways; the planting of trees thereon, and the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits, and channels for sanitary and drainage purposes or either or both thereof, with necessary outlets, cesspools, manholes, catch basins, flush tanks, septic tanks, connecting sewers, ditches, drains, conduits, channels and other appurtenances, pipes, hydrants and appliances for fire protection and breakwaters, levees, bulkheads and walls of rock or other material to protect the streets, avenues, lanes, alleys, courts, places, public ways and other property in any such city, from overflow by water, and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places, or public ways or property or rights of way of such city.

Resolution of intention.

SEC. 3. Before ordering any work done or im-

provement made, * * * the city council shall pass a resolution of intention so to do referring to the street by its lawful or official name, or the name by which it is commonly known, and briefly decsribing the work. * * * The city council may include in one proceeding, under one resolution of intention and in one contract, any of the different kinds of work mentioned in this act and any number of streets and rights of way or portions thereof, and it may except therefrom any of said work already done upon a street to the official grade. * * *

When chargeable on a district.

SEC. 4. Whenever the contemplated work or improvement, in the opinion of the city council, is of more than local or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed, if assessed upon the lots or land fronting upon said proposed work or improvement according to the valuation fixed by the last assessment roll whereon it was assessed for taxes for municipal purposes, and allowing a reasonable depth from such frontage for lots or lands assessed in bulk, the city council may make the expense of such work or improvement chargeable upon a district, which the said city council shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof.

Notice of improvement.

SEC. 5. The street superintendent shall immediately after the adoption of the resolution of intention, cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, or when the work to be done is only upon an entire crossing or intersection or any part thereof, in front of each quarter block or irregular block liable to be assessed, notices of the passage of said resolution. In case the work is chargeable upon a district as herein provided, copies of said notice shall also be posted along all the streets within such district at not more than three hundred feet in distance apart but not less than three in all on each street.

Said notice shall be headed "Notice of improvement," in letters of not less than one inch in length; and shall, in legible characters, state the fact of the passage of the resolution of intention, its date, and briefly, the work or improvement proposed, and refer to the resolution of intention for further particulars. Upon the completion of the posting of the notices of improvement the superintendent of streets shall forthwith cause to be filed in the office of the city clerk an affidavit stating the fact of the completion of the posting of such notices and the date of such completion and thereafter all persons shall be deemed to have notice of the date of the completion of such posting.

SEC. 6. At any time within fifteen days after the date of the second publication of the resolution of intention or if the posting of the notice of improvement has been completed after the second publication of the resolution of intention then within fifteen days after the date of the completion of the posting of the said notice of improvement any owner of property liable to be assessed for said work may make written protest against the proposed work or against the extent of the district to be assessed, or both. Such protest must be in writing and be delivered to the said clerk of the city council, who shall endorse thereon the date of its receipt by him. At the next regular meeting of the city council after the expiration of the time within which said protest may be so made, the city council shall proceed to hear and pass upon all protests so made and its decision shall be final and conclusive; provided, however, that when the protest is against the proposed work, and the cost thereof is to be assessed upon the property fronting thereon and the city council finds that such protest is made by the owners of a majority of the property fronting on the proposed work, or when the protest is against the proposed work and the cost thereof is to be assessed upon the property within a district and the city council finds that such protest is made by the owners of more than one-half of the area of the property to be assessed for said improvements, no further proceedings shall be taken for a period of six months from the date when said protest was received by the said clerk of said city

council, unless the said protest be overruled by an affirmative vote of four-fifths of the members of the city council. The city council may adjourn said hearing from time to time.

SEC. 7. When no protests have been delivered to the clerk of the city council within fifteen days after the date of the second publication of the resolution of intention or if the posting of the notice of improvement has been completed after the second publication of the resolution of intention then within fifteen days after the date of the completion of the posting of the said notice of improvement, or when a protest shall have been found by said city council to be insufficient, or shall have been overruled, or when a protest against the extent of the proposed district, shall have been heard and denied, immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvements.

Plans and specifications.

SEC. 8. Before passing any resolution for the construction of improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city; and for the work of constructing sewers, specifications shall always be furnished by him.

Descriptions by reference.

SEC. 9. In all resolutions, notices, orders and determinations subsequent to resolution of intention

and notice of improvement, it shall be sufficient to briefly describe the work or the assessment district or both and to refer to the resolution of intention for further particulars.

Inviting sealed proposals.

SEC. 10. Before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall pass a resolution ordering the work. Notice, with specifications, shall be posted conspicuously for five days on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered. Notice inviting such proposals, and referring to the specifications posted or on file, shall be published twice in a daily, semi-weekly, or weekly newspaper published and circulated in said city, designated by the council for that purpose, and in case there is no newspaper published in said city, then it shall only be posted as hereinbefore provided. The time fixed for the opening of bids shall be not less than ten days from the time of the first publication or posting of said notice. All proposals or bids offered shall be accompanied by a check payable to the city certified by a responsible bank, for an amount which shall not be less than ten per cent of the aggregate of the proposal, or by a bond for the said amount and so payable, signed by the bidder and two sureties, who shall justify, before any officer competent to administer an oath, in double the said amount, and over and above all statutory exemptions. Said proposals or bids shall be delivered to the clerk of

the said city council, and said council shall, in open session publicly open, examine and declare the same; provided, however, that no proposal or bid shall be considered unless accompanied by said check or bond satisfactory to the council. The city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent or unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid.

If the bids are rejected or no bids are received the city council may within six months thereafter readvertise for proposals or bids for the performance of the work as in the first instance, without further proceedings, and thereafter proceed in the manner in this section provided, and shall thereupon return to the proper parties the respective checks and bonds corresponding to the bid so rejected. But the checks accompanying such accepted proposals or bids shall be held by the city clerk of said city until the contract for doing said work, as hereinafter provided, has been entered into, either by said lowest bidder or by the owners of three-fourths part of the frontage, whereupon said certified check shall be returned to said bidder. But if said bidder fails, neglects or refuses to enter into the contract to perform said work or improvement, as hereinafter pro-

vided, then the certified check accompanying his bid and the amount therein mentioned, shall be declared to be forfeited to said city and shall be collected by it and paid into its general fund, and any bond forfeited may be prosecuted, and the amount due thereon collected and paid into said fund.

Notice of awarding contract.

SEC. 11. * * * * *

Owners may take contract.

SEC. 12. * * * * *

Re-advertising for bids.

SEC. 13. * * * * *

Delinquent contractors.

SEC. 14. * * * * *

Bond for faithful performance.

SEC. 15. * * * * *

Protesting erroneous proceedings.

SEC. 16. At any time within ten days from the date of the first publication of the notice of award of contract, any owner of, or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings, relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall

state that it is made in pursuance of this section. All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived, provided the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act.

Advancing incidental expenses.

SEC. 17. * * * * *

Conditions in contract.

SEC. 18. * * * * *

Bond for labor and material.

SEC. 19. * * * * *

Methods of assessment. Frontage assessment.

SEC. 20. Subdivision One.—The expenses incurred for any work authorized by this act (which expense shall not include the cost of any work done in such portion of any street as is required by law to be kept in order or repair by any person or company having railroad tracks thereon, nor include work which shall have been declared in the resolution of intention to be assessed on a district benefited) shall be assessed upon the lots and lands fronting thereon, except as otherwise in this act specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work.

Main street crossings.

Subdivision Two.— * * * * *

Main street terminations.

Subdivision Three.— * * * * *

Alley and main street crossings.

Subdivision Four.— * * * * *

Alley crossings.

Subdivision Five.— * * * * *

Subdivision Six.— * * * * *

One side of street.

Subdivision Seven.— * * * * *

Public property.

Subdivision Eight.— * * * * *

When owners may grade.

Subdivision Nine.— * * * * *

Diagram of assessment district.

Subdivision Ten.—Whenever the resolution of intention declares that the cost and expenses of the work and improvement are to be assessed upon a district, the city engineer shall make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show each separate lot, piece or parcel of land, the area in square feet of each of such lots, pieces or parcels of land,

and the relative location of the same to the work proposed to be done, all within the limits of the assessment district; and when said diagram shall have been approved by the city council, the clerk shall certify the fact and date thereof. Immediately thereafter the said diagram shall be delivered to the suprintendent of streets of said city, who shall, after the contractor of any street work has fulfilled his contract to the satisfaction of said superintendent of streets or city council, on appeal, proceed to estimate upon the lands, lots or portions of lots within said assessment district, as shown by said diagram, the benefits arising from such work, and to be received by each such lot, portion of such lot, piece, or subdivision of land, and shall thereupon assess upon and against said lands in said assessment district the total amount of the costs and expenses of such work, and in so doing shall assess said total sum upon the several pieces, parcels, lots, or portions of lots, and subdivisions of land in said assessment district benefited thereby, to wit: Upon each respectively, in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land. In other respects the assessment shall be as provided in the next section, and the provisions of subdivisions one, two, three, four, five, six and seven of this section shall not be applicable to the work or improvement provided for in this subdivision. [As amended April 25, 1913, in effect Aug. 10, 1913, Stats. 1913, p. 82.]

Railroad property.

Subdivision Eleven.— * * * * * *

Making the assessment.

SEC. 21. After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract (including all incidental expenses), in conformity with the provisions of the preceding section according to the character of the work done; or, if any direction and decision be given by said council on appeal, then in conformity with such direction and decision, which assessment shall briefly refer to the contract, the work contracted for and performed, and shall show the amount to be paid therefor, together with all incidental expenses, the rate per front foot assessed, if the assessment be made per front foot, the amount of each assessment, the name of the owner of each lot, or portions of a lot (if known to the street superintendent); if unknown the word "Unknown" shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot or portion or portions of a lot assessed, and shall have attached thereto a diagram exhibiting each street or street crossing, lane, alley, place or court, on which any work has been done, and showing the relative location of each district, lot, or portion of lot to the work done, numbered to correspond with the num-

bers in the assessments, and showing the number of feet fronting, or number of lots assessed, for said work contracted for and performed.

Warrant.

SEC. 22. * * * * *

Recording warrant, etc.

SEC. 23. * * * * *

Demanding payment.

SEC. 24. * * * * *

Contractors return.

SEC. 25. * * * * *

Final objections.

SEC. 26. The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work done under this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council. Notice of the time and place of the

hearing, as fixed by the council, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be posted conspicuously by the clerk, on or near the chamber door of the council chambers, for five days. Upon such appeal, the said city council may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets relative to said work; may confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the city council: and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto, at their option. All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have avoided, or have remedied, during the progress of the proceedings, or which it can at that time remedy. No assessment, warrant, diagram or affidavit of demand and non-payment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or

other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section five of this act, before the passage of the resolution ordering the work to be done.

Contractor's suit.

SEC. 27. At any time after the period of thirty-five days from the day of the date of the warrants, as herein provided, or if an appeal is taken to the city council, as provided in section twenty-six of this act, at any time after five days from the decision of said council, or after the return of the warrant or assessment, after the same may have been corrected, altered, or modified, as provided in said section twenty-six (but not less than thirty-five days from the date of the warrant), the contractor or his assignee may sue, in his own name, the owner of the land, lots, or portions of lots, assessed on the day of the date of the recording of the warrant, assessment, and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of ten per cent per annum until paid. And in all cases of recovery under the provisions of this act, where personal demand has been made upon the owner or his agent but not otherwise the plaintiff shall recover such sum as the court may fix, in addition to the taxable

cost as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall be entitled to have and recover the sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor. Suit may be brought in the superior court within whose jurisdiction the city is in which said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands the owners thereof can not, with due diligence, be found, the service of each of said actions may be had in such manner as is prescribed in the codes and laws of this state. It shall be competent to bring a single action under any such assessment irrespective of the number of lots assessed where the parties defendant are identical and where separate action are brought the same may be consolidated by order of the court. The said warrant, assessment, certificate and diagram, with the affidavit of demand and non-payment shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action.

New assessment permitted.

SEC. 28. * * * * *

City engineer.

SEC. 41. * * * * *

Inspection.

SEC. 42. * * * * *

Change of grade.

SEC. 43. The city council is hereby empowered to change or modify the grade of any public street, lane, alley, place or court, and to regrade or repave the same, so as to conform to such modified grade, in the manner as hereinafter provided. Before any change of grade is ordered the city council shall pass a resolution of intention to make such change or modification of grade, and it shall have power at the same time and in the same resolution to provide for the actual cost of performing the work of regrading, repaving, sewering, sidewalking, or curbing of said street or portion of street, with the same or other material with which it was formerly graded, paved, sewered, sidewalked, or curbed; and that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such changed or modified grade. One or more streets or blocks of streets may be embraced in the same resolution. Such resolution shall be published twice in the newspaper in which the official notices of the city council are usually printed and published, to be designated in such resolution and shall describe the proposed change or modification of grade or regrading, and shall designate and establish the district to be benefited by such change or modification of grade

or regrading, and to be assessed for the cost of the same. The superintendent of streets shall also cause to be conspicuously posted within the district designated in the resolution, notice of the passage of said resolution. Said notice shall be the same in all requirements of contents and posting as the "notices of improvement" provided for in section four of this act. If no objection to said proposed change or changes, or modifications of grade, shall be filed with the clerk of the council within thirty days from the first publication of the resolution of intention hereinbefore mentioned or, if objections are presented and after due notice and hearing are overruled by the council, the city council shall have power to order and declare such grades to be changed and established in conformity to said resolution, which order shall be posted by the clerk on the chamber door of the council for five days.

Claiming damages.

SEC. 44. * * * * *

Commissioners.

SEC. 45. * * * * *

Damages and benefits.

SEC. 46. * * * * *

Report of commissioners.

SEC. 47. * * * * *

Notice of hearing report.

SEC. 48. * * * * *

PART III.

Serial bonds may be issued.

SEC. 59. The city council of any municipality in this state shall have the power, in its discretion, to

determine that serial bonds shall be issued in the manner and form hereinafter provided to represent assessments of twenty-five dollars or over for the cost of any work or improvement authorized in part I of this act.

When and where payable.

SEC. 60. * * * * *

Notice in resolution of intention.

SEC. 61. When said city council shall determine that serial bonds shall be issued to represent the expenses of any proposed work or improvement under this act, it shall so declare in the resolution of intention to do said work, and shall specify the rate of interest which they shall bear. The like description of said bonds shall be inserted in the resolution ordering the work, in the resolution of award, and in all notices of said proceedings required by this act to be either posted or published; and also a notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council upon an appeal, shall be included in the warrant provided for in section twenty-two of this act.

Notification to treasurer.

SEC. 62. * * * * *

Form of bond.

SEC. 63. Said bond shall be substantially in the following form: * * * * *

Limitation of twenty-five dollars.

SEC. 64. In case the amount of unpaid assessments upon any lot or parcel of land shall be less than twenty-five dollars, then the same shall be collected as is hereinbefore provided in part one of this act.

Owner may stop issuance.

SEC. 65. If any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment upon his lot or parcel of land present to the city treasurer his affidavit, made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records that he is such owner of record, and with such affidavit and certificate such person notifies said treasurer in writing that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor, and the payee of the warrant, or his assigns, shall retain his right for enforcing collection as if said lot or parcel of land had not been so listed by the street superintendent.

Description of bonds.

SEC. 66. * * * * *

Penalty for default.

SEC. 67. * * * * *

Sale of property.

SEC. 68. * * * * *

Second. The words "work", "improve", "improved" and "improvement", as used in this act shall include all work mentioned in this act, and also the construction, reconstruction and repairs, of all or any portion of said work.

Third. * * * * *

Fourth. * * * * *

Fifth. * * * * *

Sixth. The words "paved" or "repaved", as used in this act, shall be held to mean and include pavement of stone, whether paving blocks or macadamizing, or of bituminous rock or asphalt, or of iron, wood or other material, whether patented or not, which the city council shall by ordinance or resolution adopt.

Seventh. * * * * *

Eighth. * * * * *

Ninth. * * * * *

Tenth. * * * * *

Eleventh. * * * * *

Twelfth. The term "quarter block" as used in this act, as to irregular blocks, shall be deemed to include all lots or portions of lots having any frontage on either intersecting street half way from such intersection to the next main street, or, when no main street intervenes, all the way to a boundary line of the city.

Thirteenth. * * * * *

Hearings.

SEC. 80. Whenever in proceedings hereunder, a time and place for hearing by the city council is fixed, and from any cause, the hearing is not then and there held or regularly adjourned to a time and place fixed, the power of the city council in the premises shall not thereby be divested or lost but the city council may proceed anew to fix a time and place for the hearing and cause notice thereof to be given by publication by at least one insertion in a daily, semi-weekly or weekly newspaper, such publication to be at least five days before the date of the hearing, and thereupon the city council shall have power to act as in the first instance.

Publication and posting.

SEC. 81. * * * * *

Construction of act.

SEC. 82. This act shall be liberally construed to the end that its purposes may be effective. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any procedure taken hereunder, which does not directly affect the jurisdiction of the city council to order the improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided.

Saving clause.

SEC. 83. This act shall in no wise affect an act entitled: "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18th, 1885; or an act entitled: "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for payment of said bonds," approved February 27th, 1893; or an act entitled: "An act to provide for local improvements upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities, such act to be known as the 'local improvement act of 1901,'" which became a law February 26th, 1901, or an act entitled: "An act to provide for the improvement of public streets, lanes, alleys, courts, and places in municipalities, in cases where any damage to private property would result from such improvement, and for the assessment of the costs, damages and expenses thereof upon the property benefited thereby," which became a law April 21, 1909, or amendments to any of said acts, or any other acts on the same subject, or apply to proceedings had thereunder, but is intended to and does provide an alternate system for making the improvements provided for by this act; and it shall be in the discretion of the legislative body of any city to proceed, under the provisions either of this act or of such other acts; but when any proceedings are commenced under this act, the pro-

visions of this act, and of such amendments thereof as may be hereafter adopted, and no other, shall apply to all such proceedings, and any provisions contained in said acts or any acts in conflict herewith shall be void and of no effect as to the proceedings commenced under this act. This act may be designated and referred to as the "Improvement Act of 1911," and shall take effect and be in force on its passage and approval.

BUTTERS ET AL. *v.* CITY OF OAKLAND ET AL.

ERROR TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT.

No. 16. Submitted October 3, 1923.—Decided November 12, 1923.

1. Where a state statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, after due hearing of the owners as required by the statute, when not arbitrary or fraudulent, cannot be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included and taxed. P. 164.
2. The fact that a city council, in revising public improvement assessments upon appeal, reduced those laid on certain areas and made up the amount of the reduction by distributing it over and assessing it upon the entire district, does not in itself establish that an assessment thus increased was, to the extent of the increase, arbitrary and not according to benefits. P. 165.
3. The California Improvement Act of 1911, as construed by the state Supreme Court, while authorizing collection of street improvement taxes, does not interfere with the taxpayer's right to compensation for damages caused to his abutting property by a change of grade, or his right to enjoin the doing of the work until such damages have been ascertained and paid. P. 166.
4. The theoretical possibility that improvement taxes laid in proportion to estimated benefits may be greater than the benefits to be actually received by land so taxed, is not enough to overturn this established method of assessment. P. 166.

53 Cal. App. 294, affirmed.

ERROR to a judgment of the District Court of Appeal of California, which affirmed a judgment against the present plaintiffs in error in their suit to enjoin the defendants from making or recording an assessment of street improvement taxes against the plaintiffs' properties.

Mr. C. Irving Wright and *Mr. J. E. Manders* for plaintiffs in error. *Mr. F. E. Boland* was also on the brief.

Mr. James A. Johnson for defendants in error. *Mr. George M. Shaw* and *Mr. R. M. F. Soto* were also on the brief.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Plaintiffs in error brought suit to restrain the defendants from making or recording an assessment of improvement taxes against plaintiffs' properties, made under the provisions of the Improvement Act of 1911, California Statutes, 1911, pp. 730–769. The improvement consists of certain street grading in the City of Oakland, together with various structures, such as culverts, etc., in connection therewith.

The authority to order such improvements is vested by the statute in the City Council, which, before making an order, must pass a resolution of intention to do so, setting forth specified details. In a case such as is here presented, the Council may delimit the district to be benefited and make the expense chargeable upon it. Public notice of the contemplated improvement is to be given, and, within stated times thereafter, the owner of any assessable property may protest in writing against either the proposed work or the extent of the district to be assessed, or both. Such protest must be heard and passed upon by the Council and "its decision shall be final and conclusive." If the protest be denied, the Council may order the proposed improvement. Provision is made for inviting bids and awarding and making contracts therefor and for reviewing the proceedings at the instance of any interested person. Where the cost of the improvement is to be assessed against a district, diagrams of the property benefited must be made, showing each separate lot, piece or parcel of land, its area, relative location, etc. Thereupon the Superintendent of Streets must estimate the benefit to be received by each of such parcels of land

" in proportion to the estimated benefits to be received by each," and thereafter an assessment to cover the same is made. Any person interested may appeal to the City Council in respect of these and prior proceedings, including the question of the correctness or legality of the assessment. The decision of the City Council thereon is made final and conclusive as to all persons entitled to appeal.

The trial court found the issues of fact and of law against plaintiffs and entered judgment accordingly, which was affirmed by the Court of Appeal for the First Appellate District, 53 Cal. App. 294. A petition to have the cause heard in the state Supreme Court was denied, and it comes here by writ of error to the District Court of Appeal. The federal question raised in the court below and presented here is that the state statute and the assessment against plaintiffs' properties offend against the Federal Constitution in that the one arbitrarily authorizes and the other arbitrarily imposes a tax upon plaintiffs' properties for a local improvement in excess of the benefits received and without providing for resulting damages, and thereby they are deprived of their property without due process of law, in violation of the Fourteenth Amendment. Several grounds are urged in support of this contention, which we consider in their order.

1. Plaintiffs in error contend that the assessment was not in proportion to the benefits because certain property, also benefited by the improvement, was omitted from the district. Without reviewing the circumstances said to establish this contention, it is enough to say that the municipal authorities were empowered to establish the district benefited and to assess the tax in proportion to the benefits. Ample provision is made for a hearing and a hearing was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or

fraudulently. The assessment was reviewed upon appeal by the City Council, and that body, after a hearing, altered it in some particulars, and caused a new warrant of assessment to be issued. Its action, under the statute, was final and conclusive and is not open to attack in this proceeding. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 167–170, 175; *Hibben* v. *Smith*, 191 U. S. 310, 321–323; *Jelliff* v. *Newark*, 48 N. J. L. 101, 109; *Embree* v. *Kansas City, &c. Road District*, 240 U. S. 242, 247–249.

2. Upon review by the City Council deductions were made from the amounts assessed upon certain areas included within the district and a sum equal to the aggregate thereof was distributed over and assessed upon the entire district, resulting in some increase in the assessment upon plaintiffs' properties. It is urged that this establishes, to the extent of the increase, that the assessment was arbitrary, and not according to benefits. The Supreme Court of California in another case, involving the same assessment, has held otherwise. *Rockridge Place Co.* v. *City Council*, 178 Cal. 58, 62–63. The whole matter seems to have been fully heard and carefully considered by the City Council and its adjustment upon the basis that the assessment upon some property within the district was too high and that upon the remainder too low cannot be upset merely because the aggregate amount deducted from the one coincides with that applied upon the other, since the Council, after a full hearing, expressly found that the assessment as finally made was in accordance with the benefits. It is impossible for us to say that the property assessed did not receive an additional benefit to the extent of the amount thus proportionately distributed. The determination of the Council is so largely a matter of opinion, that, in the absence of convincing evidence of error it will not be disturbed. See *Jelliff* v.

Newark, supra; Walker v. *City of Aurora*, 140 Ill. 402, 411; *Sanitary District* v. *Joliet*, 189 Ill. 270, 272; *State, Pudney, pros.*, v. *Village of Passaic*, 37 N. J. L. 65, 67–68.

3. Plaintiffs insist that the order directing the improvement in question is invalid because no provision is made for the ascertainment and adjustment of damages occasioned to abutting owners by a change of grade. As construed by the state Supreme Court the statute simply authorizes the collection of the assessment, but does not interfere with the right of a taxpayer whose property may be injured thereby to receive compensation or to enjoin the doing of the work until it is ascertained and paid. 53 Cal. App. 299; *Wilcox* v. *Engebretsen*, 160 Cal. 288, 298–299. We must accept this construction. Two of the plaintiffs, in fact, availed themselves of this remedy and recovered damages against the City.

4. The statute provides that the expense of the work may be chargeable upon the district which the City Council declares to be benefited by the improvement, and that such cost shall be assessed upon the several lots in the district "in proportion to the estimated benefits to be received by each"; and it is urged by plaintiffs that the cost may exceed the benefits, in which event the proportionate assessment of the estimated benefits may, in fact, be greater than the actual benefits received. We are not impressed with this contention. It is not unreasonable to assume that ordinarily the cost of street grading and paving, within municipalities such as this statute deals with, will not exceed the benefits which the adjoining land owners will receive, and it is neither alleged nor proven that it has in fact done so in the present case. The method of assessment provided for is an old and familiar one and embodies a principle too well established to be overturned by the suggestion of a theoretical possibility that there may not be an exact and mathematical relation between cost and benefit in particular instances. See

Louisville & Nashville R. R. Co. v. *Barber*, 197 U. S. 430, 433–434; *Martin* v. *District of Columbia*, 205 U. S. 135, 138–140.

Affirmed.